ful forces of disunity. When the Whig party finally collapsed it caused a major realignment in American politics and contributed to the coming of a terrible Civil War that divided this nation in two. But the events of this period between the birth and demise of the Whig party will be the subjects of my later addresses in this series. These were the turbulent years when the Senate would grow, in the words of the commemorative booklet on the Old Senate Chamber, "from a small council to the primary forum for the great national debates of the mid-nineteenth century." [35]

Mr. President, I ask unanimous consent to include notes to "Censure Of Andrew Jackson, 1833-1837."

There being no objection, the notes were ordered to be printed in the RECORD, as follows:

NOTES TO "CENSURE OF ANDREW JACKSON, 1833-1837"

[1] Glyndon Van Deusen, *The Jacksonian Era, 1828-1848* (New York: Harper and Row, 1959), 80-81.

[2] Peter Temin, *The Jacksonian Economy* (New York: W. W. Norton, 1969).

[3] Van Deusen, *The Jacksonian Era*, 83.

[4] *Register of Debates in Congress*, 23rd Congress, 1st sess., 27.

[5] *Ibid.*, 37.

[6] Charles Francis Adams, ed., *Memoirs of John Quincy Adams*, Vol. IX (Freeport, New York: Books for Libraries Press, 1969, 1874), 51.

[7] *Register of Debates*, 23rd Congress, 1st sess., 58-89.

[8] *Ibid.*, 59-94.

[9] *Ibid.*, 1172.

[10] Margaret L. Coit, *John C. Calhoun, American Portrait* (Boston: Houghton Mifflin, 1950), 263-265, Irving H. Bartlett, *Daniel Webster* (New York: W. W. Norton, 1978), 144-145.

[11] Glyndon Van Deusen, "The Whig Party," and Michael F. Holt, "The Democratic Party, 1828-1860," in Arthur M. Schlesinger, Jr., ed., *History of U.S. Political Parties*, Vol. I (New York: R. R. Bowker, 1973), 333-399, 570-508.

[12] Thomas Hart Benton, *Thirty Years' View; or, a History of the Working of the American Government for Thirty Years, From 1820 to 1850* (New York: D. Appleton, 1883), 400-401.

[13] Charles M. Wiltse, ed., *The Papers of Daniel Webster, Correspondence, 1830-1834*, Vol. 3 (Hanover: University Press of New England, 1977), 288; Bartlett, *Daniel Webster*, 3-11; John F. Kennedy, *Profiles in Courage* (New York: Harper and Row, 1957), 64.

[14] Benton, *Thirty Years' View*, 420-421.

[15] Adams, *Memoirs of John Quincy Adams*, Vol. IX, 116.

[16] *Register of Debates*, 23rd Congress, 1st sess., 1187.

[17] Benton, *Thirty Years' View*, 529-49.

[18] *Register of Debates*, 23rd Congress, 1st sess., 1319.

[19] *Ibid.*, 1335.

[20] *Journal of the Senate of the United States*, 23rd Congress, 1st sess., 226-228.

[21] Congressional quarterly's *Guide to Congress* (Washington: Congressional Quarterly, 1976), 582-583.

[22] Oliver Perry Chitwood, *John Tyler, Champion of the Old South* (New York: D. Appleton, 1939), 138.

[23] Henry A. Wise, *Seven Decades of Union, the Humanities, and Materialism, Illustrated by a Memoir of John Tyler* (Philadelphia: J. B. Lippincott, 1881), 142.

[24] Benton, *Thirty Years' View*, 550.

[25] *Ibid.*, 727.

[26] *Register of Debates*, 24th Congress, 2d sess., 500.

[27] Benton, *Thirty Years' View*, 550.

[28] Claude Bowers, *Party Battles of the Jackson Period*, (Boston: Houghton Mifflin, 1922), 470; Wise, *Seven Decades of Union*, 143.

[29] Wise, *Seven Decades of Union*, 143.

[30] *Register of Debates*, 24th Congress, 2d sess., 505-506.

[31] Bowers, *Party Battles of the Jackson Period*, 471.

[32] Elbert B. Smith, *Magnificent Missourian, The Life of Thomas Hart Benton* (Philadelphia: J. B. Lippincott, 1958), 165.

[33] Glyndon Van Deusen, *The Life of Henry Clay*, (Boston: Little, Brown, 1937), 276-300.

[34] Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979), 11-22.

[35] Senate Commission on Art and Antiquities, *The Senate Chamber, 1810-1859* (Washington: The Government Printing Office, 1976), 8.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER (Mr. ROTH MAN). Is there further morning business? If not, morning business is closed.

INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981

The PRESIDING OFFICER. The clerk will now report the pending business.

The legislative clerk read as follows:

A bill (S. 391) to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

The Senate resumed consideration of the bill.

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, during earlier debate on S. 391, the Intelligence Identities' Protection Act, I raised the question of whether the Supreme Court had ever upheld a statute in the first amendment area where the only criminal intent required was a "reason to believe" standard which the Justice Department has described as a negligence standard. The proponents of the "reason to believe" standard have not cited any Supreme Court precedent upholding a statute proscribing activity in the first amendment area where a requirement of bad purpose was not included in the statute. Senator CHAFEE did cite four lower court cases which discussed a "reason to believe" standard in national security crimes.

When I earlier talked about this, Mr. President, I expressed my concern about dangers to the first amendment and stated that in my years in public life, both as a prosecutor and U.S. Senator, the part of the Constitution which has guided me the most, and certainly guided my consideration the most, has been the first amendment.

I feel that it is by far the most important part of our Constitution. Not only does everything else pale beside the first amendment, but it is questionable whether the rest of the Constitution could last long without the first amendment.

So I was interested in the cases cited by Senator CHAFEE. I was interested in whether a negligence standard had been applied in a first amendment case. If so, then I would be quite concerned that we might see a quick erosion of the first amendment.

I found that none of the cases really addressed the issue before the Senate. Three of the cases involved no first amendment claims whatsoever. Two of these cases concerned sabotage during time of war or national emergency. The third involved a related crime of producing defective war material during time of war or national emergency. Clearly, persons engaged in blasting high voltage electric powerlines, burning ROTC buildings, or knowingly supplying the Army with defective airplane parts cannot be compared to a newspaper reporter legitimately investigating abuses by the intelligence community.

Only one of the cases cited last week by Senator CHAFEE, the Progressive case, involved any first amendment rights. That case involved no prosecution under the "reason to believe" standard. Rather, the case was a civil action seeking to enjoin the Progressive magazine from publishing material classified as "restricted data" under the Atomic Energy Act. While the injunction was entered at the district court level, it should be noted that the Government dropped the case on appeal, the magazine published the data, and no prosecution under the "reason to believe" standard ensued.

I repeat what I said earlier. This issue is too serious to afford the Senate the luxury of seing just how close to the constitutional limit we can go without crossing over the line.

I am getting very concerned, Mr. President, that in matter after matter coming before the Senate of late, we try to see how far we can push the Constitution.

I see more and more the position taken that we really should not act on constitutional issues here, but simply pass a law and let the Supreme Court straighten out whatever mess we might create.

Mr. President, we have a duty to preserve and protect the Constitution,

and I want to make sure that we indeed do that.

Really, with no legal precedents supporting the position put forward by the distinguished Senator from Rhode Island, put forward out of a sincere desire to protect the legitimate interests of our intelligence agents, a desire shared by me—he and I being of one mind in that regard, but of different minds as to how we go about doing it—with no legal precedents supporting his position, the safer thing to do, the wiser thing to do, is to follow the only Supreme Court decision clearly on point in this area, the Gorin decision, and include a bad purpose or intent standard in section 601(c) in the bill.

I now wish to present a summary of the facts and holdings of the cases cited by Senator CHAFEE.

United States v. *Achtenberg*, 459 F.2d 91 (8th Cir. 1972).

In Achtenberg the defendant had been convicted of violating the Sabotage Act due to his involvement in a series of incidents including the burning of an Army ROTC building at Washington University in late 1970. The Sabotage Act applies only in time of war or national emergency. On appeal, the court determined that the coverage of the Act was not overbroad and that its meaning was not unconstitutionally vague. "Reason to believe" was among those terms held not unconstitutionally vague. Although the statute would ordinarily proscribe the burning of an Army ROTC building as something which might injure, interfere with or obstruct the United States in preparation for war, the court reversed and remanded for a new trial due to procedural errors by the lower court which had resulted in prejudice to the defendant.

United States v. *Bishop*, 555 F.2d 771 (10th Cir. 1977).

The defendant, Bishop, had been convicted of bombing and destroying four high voltage line towers which, due to their proximity to and use by federal military contractors, an Air Force Base and an Arsenal, were considered under the protection of the Sabotage Act. The purpose of the bombings had been to create domestic turmoil which would require the government to bring troops back from Vietnam. The defendant asserted that terms such as "reason to believe" were unconstitutionally vague. The court held that the Federal Sabotage Act was sufficiently clear to give fair notice of prohibited acts to a normally intelligent person, and was not void for vagueness.

Although there was sufficient evidence regarding the defendant's activities for conviction, the court held that the declaration of a national emergency in 1950, upon which the prosecution was based, did not give the defendant sufficient notice that the Act, which is only applicable when there is a declarded war or a national emergency, would proscribe his conduct. The court reversed the conviction with the direction that the indictment be dropped.

Schmeller v. *United States, 143 F2d. 544 (6th Cir. 1944).*

The appellants in Schmeller, a manager and a metallurgist for a foundry company which made aluminum castings for airplanes used in World War II, had been convicted under a federal statute that prohibited the making of war material in a defective manner. The offense must be "willful" and done with "reason to believe" that the act may injure or interfere with governmental war measures. That statute proscribes such activity only "when the United States is at war or in times of national emergency," and requires that the accused know he is producing a defective product.

The constitutionality of the "reason to believe" standard was not addressed by the court. The court instead focused on the evidentiary and procedural difficulties encountered in the court below. The court determined that the minor imperfections in the casting were not such as to render them "defective" and that no evidence in the record supported the conviction of the appellants. The judgments and the sentences were set aside and the lower court was ordered to grant defendants' motion for a directed verdict.

United States v. *Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979); 486 F. Supp. 5 (W.D. Wis. 1979), *appeals dismissed*, 610 F.2d 819 (7th Cir. 1979).

In *Progressive*, the United States brought a civil case seeking a temporary restraining order to enjoin the release of an article by *Progressive* magazine detailing the manufacture and assembly of the hydrogen bomb. A preliminary injunction was sought on the basis that the article contained government information classified within the meaning of "restricted area" under the Atomic Energy Act and that publication of such an article would "likely constitute a violation of the Act." That Act prohibits anyone from communicating, transmitting, or disclosing any restricted data to any person "with reason to believe that such data will be utilized to injure the United States or to secure an advantage to any foreign nation."

The court determined that there were concepts presented in the article which came within the definition of restricted data in the Atomic Energy Act. The court found that the statute and standards as applied in the case were not vague or overboard. The court concluded that the release of such essentially classified material would secure an advantage to foreign nations within the meaning of the Act, by assisting foreign nations in the development of nuclear weaponry and accelerating "the membership of a candidate nation in the thermonuclear club."

The preliminary injunction was entered by the district court. The court did not address the question of whether the reason to believe standard in a criminal prosecution would violate the First Amendment. Nor did the court address whether the reason to believe standard as used in the Atomic Energy Act, referring to willful use of the information to injure the United States or advantage a foreign nation, requires a showing of bad purpose. *See Gorin* v. *United States*, 312 U.S. 19, 27-28 (1941) (Intent or reason to believe that information obtained is to be used to injure the United States requires a showing that defendant acted in bad faith).

Later developments rendered the case moot before the court of appeals could review the decision. While awaiting appeal, information regarding the makeup of nuclear weaponry became public knowledge, prompting the Justice Department to drop its case. The article in question was ultimately published. Although the Justice Department reserved its right to bring criminal charges against *Progressive*, none were ever brought.

Mr. President, let me just address myself briefly once more on this.

All of us, I believe, in the Senate are quite interested in seeing that the identities of our agents, abroad or here, are protected. We do not want to see a list of members of our intelligence agencies published, especially in countries where they may be in physical harm.

Contrary to the view that some have of a James Bond kind of superagent, so many of our intelligence agents are among the most innocuous people you will meet. Many are downright professorial. Their duties may involve analyses of the published reports of the particular country in which they serve, economic analyses, linguistic analyses. These agents are there because of their economic or linguistic abilities, certainly not because of their martial arts abilities or anything of that nature.

All of these agents must be protected. As I said earlier, I commend the distinguished Senator from Rhode Island for his efforts in wanting to protect them.

In doing so, however, we protect them because by protecting them we protect the interests of our country. Let us not forget that one of the greatest interests of our country is in protecting our own Constitution, the framework of our own Government, and as I said before, the foundation of our Constitution has to be the first amendment. If the first amendment fails, everything fails with it. If we remove the right of free press and the right and ability of people to speak out in this country, what have we sacrificed for over 200 years? What do we stand for today? What does this body stand for, this Chamber, what do each of us as Members stand for, if not to protect the people's right of free speech?

We are separate and apart from every other country in the world because of our first amendment. No other country has such rigid right of free speech. In the guise of protecting ourselves, let us not harm ourselves by cutting back on that right.

I would urge that we not adopt a negligence standard, something that is more appropriate to the less stringent nature of civil law.

I would point out as I did last week, Mr. President, that the Justice Department and the Director of the CIA have both said that the provision passed by the Judiciary Committee, the amendment proposed by Senator BIDEN, myself, and others, would be acceptable to them, that they could prosecute under it, and it would give them the protection they needed. Not only that, but they said that the provision proposed by us would pass constitutional muster. Everybody appears to agree on that.

The provision proposed by my distinguished friend from Rhode Island, however, does not have a unanimity of opinion as whether it is constitutional and, for that reason alone, we ought to stay away from it.

Certainly, if we have a provision that can pass constitutional muster, that can protect our agent identities, then that is the one that we should go with.

Mr. President, at this time, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. CHAFEE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1256

Mr. CHAFEE. Mr. President, I ask unanimous consent that two more cosponsors be added to my amendment: Senator McCLURE of Idaho and Senator MURKOWSKI of Alaska.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CHAFEE. Mr. President, I wish to address certain statements that have been made in the course of the debate on this bill, which has covered a period, intermittently, of the last 2 weeks. The matter which we are addressing is the amendment which I submitted, amendment No. 1256. That is the pending matter on the floor.

POSITION OF THE ADMINISTRATION

At various times during the course of consideration of the identities legislation and my amendment, it has been suggested that the committee version—not my amendment but the committee version—is acceptable to the administration. In support of this contention, proponents of the committee version have introduced into the RECORD a letter dated July 15, 1981. That letter was from the Director of the Central Intelligence Agency, Mr. Casey, to Chairman BOLAND of the House Intelligence Committee. In this letter, Director Casey declared his willingness to support what was then the House Intelligence Committee version of the legislation. The proponents of the Judiciary Committee version—which is on the floor here today—have cited this letter but have consistently failed to note the fact that the Director stressed that the Chafee-Jackson version, or the amendment on the floor today, is preferable.

Let me quote from the letter. After expressing his willingness to support what was then the House Intelligence Committee's version of the bill, Director Casey said:

I must emphasize, however, that the administration's preference for S. 391, the Senate version of the Identities Bill, remains unchanged.

What he is referring to there is the bill as originally introduced, which, of course, is the amendment which I have on the floor today. It should be emphasized, thus, that when the Director was saying the House language was acceptable, it was clearly not the preference of the administration.

Mr. President, I ask unanimous consent that Director Casey's letter of July 15, 1981, to the chairman of the House Intelligence Committee, Representative BOLAND, be printed in the RECORD at this time.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., July 15, 1981.

Hon. EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have had my General Counsel look carefully at the proposed amendment to H.R. 4 which you sent to us on 24 June. As you will note from the enclosed memorandum, he believes that the proposed amendment may be deficient in certain respects and that it could undermine the effectiveness of the legislation. He has set forth an alternative which would be acceptable under certain conditions. We would be prepared to support this alternative, which I understand is already familar to members and staff of your Committee, if its adoption would ensure House floor consideration of the Identities Bill directly following the reporting of H.R. 4 from your Committee. I must emphasize, however, that the Administration's preference for S. 391, the Senate version of the Identities Bill, remains unchanged.

I hope that you have had the opportunity to read the Supreme Court's opinion in *Haig* v. *Agee*, which was handed down on 29 June. This opinion goes a long way toward dispelling any residual concerns about the constitutionality of the Identities legislation. I believe we must avoid any further delay which would jeopardize our mutual goal of securing enactment of the Identities Bill in this session of Congress. I hope, therefore, that the Permanent Select Committee on Intelligence will move forward expeditiously in reporting H.R. 4 favorably.

Sincerely,

WILLIAM J. CASEY,
Director of Central Intelligence.

Mr. CHAFEE. Mr. President, during the debate on this bill on March 4 of this year, the Senator from Pennsylvania (Mr. SPECTER) declared that he had met with Director Casey twice and that Director Casey stated that he found the Judiciary Committee version of the bill to be acceptable. I received a letter from Mr. Casey dated March 12, 1981, which I believe provides the definitive statement of the intelligence community's position on the indentities bill. I wish to read Mr. Casey's letter at this time. This is the intelligence community's position on this legislation. The letter is addressed to me.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., March 12, 1982.

Hon. JOHN H. CHAFEE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR CHAFEE: It has been brought to my attention that, during the Senate's consideration of the Intelligence Identities Protection Act on 4 March 1982, Senator Specter declared he had met with me twice, and he knew that I find the Judiciary Committee version of S. 391 to be acceptable.

I believe it is important that you have the benefit of my position. Certainly the Judiciary Committee version of the Bill would be preferable to no legislation at all; but it should be clear that the Intelligence Community firmly supports the Attorney General and the President in their belief that the verson of subsection 601(c) passed by the House of Representatives and embodied in the Chafee-Jackson amendment to S. 391 is, as President Reagan put it in his letter of 3 February 1982 to the Majority and Minority Leaders of the Senate, "far more likely to result in an effective law." I believe Senator Specter fully understands that this is my position.

Sincerely,

WILLIAM J. CASEY,
Director of Central Intelligence.

At the same time, Mr. President, I ask unanimous consent that President Reagan's letter of February 3, 1982, to which Director Casey refers, also be printed in the RECORD at this time. Before that goes in, Mr. President, I shall quote just a few words from it:

Last September the House of Representatives overwhelmingly passed the Administration-supported version of the Intelligence Identities Protection Act. The Senate is soon to take up consideration of this legislation, and you will have before you two versions. While I believe that both versions are fully protective of constitutional guarantees, Attorney General Smith and I firmly believe that the original version, first introduced by Senator Chafee and others, is far more likely to result in an effective law that could lead to successful prosecution.

I strongly urge you and each of your colleagues to support the carefully-crafted Chafee-Jackson amendment to S. 391. I cannot overemphasize the importance of this legislation.

That is signed by Ronald Reagan and this letter, which was also sent to the minority leader, was addressed to the majority leader (Mr. BAKER) on February 3, 1982.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

THE WHITE HOUSE,
Washington, February 3, 1982.

Hon. HOWARD H. BAKER,
Majority Leader,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BAKER: Legislation to make criminal the unauthorized disclosure of the names of our intelligence officers remains the cornerstone for the improvement of our intelligence capabilities, a goal that I know we share. Nothing has been more damaging to this effort than the pernicious disclosures of the names of officers whom we send abroad on dangerous and difficult assignments. Unfortunately, these disclosures continue with impunity, endangering lives, seriously impairing the effectiveness of our clandestine operations, and adversely affecting morale within our intelligence agencies.

Last September the House of Representatives overwhelmingly passed the Administration-supported version of the Intelligence Identities Protection Act. The Senate is soon to take up consideration of this legislation, and you will have before you two versions. While I believe that both versions are fully protective of constitutional guarantees, Attorney General Smith and I firmly believe that the original version, first introduced by Senator Chaffee and others, is far more likely to result in an effective law that could lead to successful prosecution.

I strongly urge you and each of your colleagues to support the carefully-crafted Chafee-Jackson amendment to S. 391. I cannot overemphasize the importance of this legislation.

Sincerely,

RONALD REAGAN.

Mr. CHAFEE. Mr. President, there can be no question as to the position of the President of the United States, the Justice Department, or the intelligence community with respect to the Chafee-Jackson amendment to this bill, the amendment we are now considering.

They all prefer it. They want it to pass the Senate. They want the Chafee-Jackson language to be subsection 601(c) of S. 391.

DIFFERENCE BETWEEN VERSIONS

Mr. President, we have had considerable debate on this matter, principally led by the Senator from Delaware. On February 25, 1982, some statements were made by that distinguished Senator in which he implied there really was no difference between the intent language and the reason to believe language as it applied to the effectiveness of this legislation in securing a successful prosecution. I read from Senator BIDEN's statement in the RECORD:

> The Senator says we have these guys who are publishing these bulletins saying, "Well, I intended to help America when I disclosed the name of Joe Doakes, who is an agent of the CIA, so don't find me guilty because, although I intended something, I did not intend to hurt, I intended to help."
>
> I submit that under the reason to believe standard, he can say the same thing.

In other words, Senator BIDEN is now taking issue with the amendment I have on the floor—namely, the reason to believe language—and he suggests, as we learn through this quotation, that he thinks a defendant can successfully escape prosecution by saying that he really did not intend to do any harm, that he really intended to help the intelligence community.

Senator BIDEN continues:

> I submit that under the reason to believe standard, he—
>
> Meaning the accused—
>
> can say the same thing. He can stand before the jury and say, "Ladies and gentlemen, I had reason to believe this would help America when I disclosed the name of Joe Doaks"—

namely, the CIA agent.

That completes the quotation from the record of February 25 of this year.

Mr. President, the implication of the statement by the distinguished Senator from Delaware is that the reason to believe standard is really just as subjective as the intent to impair or impede standard. A defendant can claim that he had no reason to believe his disclosure would impair or impede U.S. intelligence activities.

Of course, a defendant can claim he had no reason to believe, just as he can claim he had no intent to harm the intelligence activities of the United States. However, that is not the essential point. A defendant can claim anything, any time.

The point is this: Under the subjective language—namely, the intent language which is in the committee bill—a jury must find that the defendant actually possessed the requisite intent to impair or impede intelligence activities of the United States. The jury has to find that intent in the breast of the defendant.

Under the reason to believe language, which we have in my amendment, the jury can determine that under all the relevant facts and circumstances, a reasonable person would have had reason to believe that his disclosure would impair or impede the intelligence activities of the United States. That is the objective standard. The reason we consider the reason to believe language to be objective is that you can look at the facts and ask, "Is this what a reasonable person would have had cause to believe?"

Thus, Mr. President, the reason to believe standard takes the jury out of the breast of the defendant, out of the intent to impair and impede, and requires the jury to concentrate on the objective facts of the matter. Surely, this is an important difference.

Furthermore, the distinguished Senator from Delaware has stated that both versions of the bill can get the job done. He says:

> Why take a chance with the Chafee-Jackson amendment, which is more likely to be declared unconstitutional?

I do not agree that both versions will get the job done. There are serious questions as to whether the subjective intent standard in the committee bill will be effective. This issue, as to whether Senator BIDEN's specific intent standard would be effective from a prosecutorial standpoint, was raised before the House Intelligence Committee last year, on April 7, 1981, when Mr. Richard Willard, counsel to the Attorney General for Intelligence Policy, stated as follows:

> . . . The specific intent requirement could serve to confuse the issues to the point where the Government could be unable to establish the requisite intent beyond a reasonable doubt in prosecutions brought under the statute.

This is a representative of the Attorney General's speaking, who was counsel to the Attorney General of the United States. This is what he says.

Mr. Richard Willard believes, as we note here, that the intent requirement could serve to confuse the issue, to the point where the Government would be unable to establish the intent beyond a reasonable doubt.

Mr. Willard dismissed the intent provision. Then he moves to the bill that was originally introduced which contains my language. He says:

> The Senate counterpart of this bill. S. 391, alleviates these potential problems by requiring only that a defendant be shown to have had "reason to believe," rather than specific intent, that the disclosure would impair or impede U.S. intelligence activities. This objective standard is preferable to the Justice Department since it would relieve the difficult burden otherwise imposed on the Government to prove the defendant acted with an evil state of mind. This type of "reason to believe" standard has been found by the courts to be valid and has survived constitutionally-based charges of overbreadth and vagueness. See, e.g., *United States* v. *Bishop*, 555 F.2d 771 (10th Cir. 1977); *Schmeller* v. *United States*, 143 F.2d 544 (6th Cir. 1944). We believe this standard would be more easily applied and sustained by the courts.

That concludes the statement by Mr. Willard.

So this reason-to-believe standard is nothing new. It is not something we have plucked from the air. This is a standard that exists in current statutes, particularly statutes dealing with espionage and related activities, and it has been held constitutional. It has been held constitutional by surviving the challenges both on overbreadth and vagueness.

Mr. President, I believe it is extremely important that Congress pass an effective bill.

(Mr. MATTINGLY assumed the chair.)

Mr. CHAFEE. The language in the Senate Judiciary Committee's version has already been rejected by the House of Representatives. The language in 601(c) that we are considering here in the Chamber came from the Senate Judiciary Committee. It is the exact same language that came onto the floor of the House of Representatives from committee. The language was changed on the House floor. It was rejected, and in place of it was substituted the very language I have in my amendment. That language passed overwhelmingly in the House, 354 to 56 last fall.

If we want a bill and if we want to deal with this problem, then let us adopt the amendment I am proposing. Make it part of the bill, pass the bill, and then the bills from the Senate and the House of Representatives will be practically the same. There will be no long drawn out conference. There will be no problems. We will have legislation. We will stop "naming names." If we reject my amendment and adopt the committee language, then we have problems resolving this difference with the House of Representatives. Then I could not make any prediction as to whether we will indeed have legislation on this subject this year or any year.

All of us have seen situations arise where different languages are passed in each House, there are long delays, and sometimes the differences are never reconciled. I have been through conferences where conferees never came to a conclusion.

So if we truly want legislation, I urge the support of my amendment.

It is not true that the reason to believe standard is more likely to be declared unconstitutional. The Supreme Court has spoken on the issue in the Agee case. The court specifically said that unauthorized disclosures of intelligence identities "are clearly not protected by the Constitution."

The Carter and Reagan Justice Department have both favored the objective reason-to-believe standard. The reason to believe standard is contained

in a number of Federal criminal statutes and had been upheld by the courts.

At this point I ask unanimous consent to have printed in the RECORD the following items:

One, a listing of Federal criminal statutes employing reason to believe, and we have here nine separate ones in which the reason-to-believe standard is there. I will not give the United States Code numbers. They are all in 18 U.S.C. except for the last one which is 42 U.S.C. But they deal with gathering defense information, duplication of defense documents or objects, receiving defense information, transmitting defense information, unauthorized possession of defense information, providing defense information to aid foreign governments, destruction of defense facilities, obstructing defense production, and communication of restricted data.

All these statutes have the language utilizing the reason-to-believe standard. Sometimes it is prefaced by the phrase "with intent or reason to believe." It does not mean "and reason to believe." It means one or the other.

The first statute refers to gathering defense information; the next one prohibits duplication of defense documents or objects. They have the intent or reason-to-believe language.

The next statute refers to receiving defense information. The language talks about knowing or having reason to believe that it could be used contrary to the provisions of the statute. Notice there is no intent language whatever in there. Knowing or having reason to believe is the language.

The next statue deals with transmitting defense information and has only the reason to believe standard. There is no intent standard.

Another statute prohibits the unauthorized possession of defense information, which the possessor has reason to believe could be used to the injury of the United States. There is nothing about intent. Instead it requires the reason to believe standard for prosecution.

The destruction of defense facilities legislation, 18 United States Code 2153, section (a), states that the defendant must have the intent or reason to believe that his act may injure the United States. Again, in 18 United States Code 2154, obstructing defense production, there is the same standard: Anyone with intent or reason to believe his act may injure the United States.

In 42 United States Code 2274(b), communication of restricted data, the act states that whoever communicates restricted data with reason to believe such data will be utilized to injure the United States shall be punished.

The second group of documents is a review of Federal court cases involving the reason to believe standard. I shall just quote one: *Schmeller* v. *United States* (Sixth circuit, 1944).

Schmeller and others were convicted of violating a Federal statute which reads in pertinent part:

"When the United States is at war * * *

This is in a war situation, but the pertinent point is the following language:

* * * whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States

The Court of Appeals affirmed the sufficiency of the indictment under the statute.

Quoting now the sixth circuit:

Under the latter part of this statute the specific intent to injure or interfere with the war effort of the United States or any associate nation need not be proved.

There is no necessity to prove intent.

The act of willfully making war material in a defective manner, with reason to believe that the act may injure or interfere with governmental war measures, constitutes the offense.

And the court continued:

The appellants are clearly apprised of the specific offense charged, for the casting is identified and its heat number gives the appellants the precise date.

Mr. President, next are highlights of Supreme Court cases dealing with the subject of governmental interests restricting the first amendment in certain situations.

I wish to discuss briefly *Haig* v. *Agee,* 101 Supreme Court 2766, which was just decided last year. It is very analogous to the first amendment arguments that are being raised on the floor here today.

In that case, Philip Agee, an American citizen and a former Central Intelligence Agency employee, engaged in activities abroad that resulted in identification of alleged undercover CIA officers and intelligence sources in foreign countries. In accordance with a State Department regulation issued under the Passport Act of 1926, the Secretary of State revoked Mr. Agee's passport on the ground that he was causing serious damage to the national security of the United States. The Supreme Court upheld the revocation as consistent with the Constitution and the Passport Act.

And this is what the Chief Justice said with regard to the first amendment:

Assuming arguendo that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation. The revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel. Long ago, however, this Court recognized that "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of its troops."

The Chief Justice continues:

Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They *are clearly not protected by the Constitution.* The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law. (Emphasis added.)

That is the end of Chief Justice Burger's quote.

Mr. President, I ask unanimous consent that those articles be printed in the RECORD.

There being no objection, the material was ordered to be printed in the "RECORD, as follows:

CURRENT FEDERAL CRIMINAL STATUTES EMPLOYING "REASON TO BELIEVE" SCIENTER STANDARD

Nine separate federal criminal offenses include the "reason to believe" scienter standard:

(1) 18 U.S.C. 793(a): Gathering defense information;

(2) 18 U.S.C. 793(b): Duplication of defense documents or objects;

(3) 18 U.S.C. 793(c): Receiving defense information;

(4) 18 U.S.C. 793(d): Transmitting defense information;

(5) 18 U.S.C. 793(e): Unauthorized possession of defense information;

(6) 18 U.S.C. 794(a): Providing defense information to aid foreign government;

(7) 18 U.S.C. 2153: Destruction of defense facilities;

(8) 18 U.S.C. 2154: Obstructing defense production;

(9) 42 U.S.C. 2274: Communication of restricted data.

18 U.S.C. 793(a): Gathering defense information:

Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both.

18 U.S.C. 793(b): Duplication of defense documents or objects:

Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue-

print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 793(c): Receiving defense information:

Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both.

18 U.S.C. 793(d): Transmitting defense information:

Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both.

18 U.S.C. 793(e): Unauthorized possession of defense information:

Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2153: Destruction of defense facilities:

(a) Whoever, when the United States is at war, or in times of national emergency as declared by the President or by the Congress; with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years, or both.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

18 U.S.C. 2154: Obstructing defense production:

(a) Whoever, when the United States is at war, or in times of national emergency as declared by the President or by the Congress, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully makes, constructs, or causes to be made or constructed in a defective manner, or attempts to make, construct, or cause to be made or constructed in a defective manner any war material, war premises or war utilities, or any tool implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, war premises or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years, or both.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

42 U.S.C. 2274: Communication of restricted data:

Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with any document, writing, sketch, photograph, plan, model, instrument, appliance, note, or information involving or incorporating Restricted Data—

(a) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by imprisonment for life, or by imprisonment for any term of years or a fine of not more than $20,000 or both;

(b) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than $10,000 or imprisonment for not more than ten years, or both.

HIGHLIGHTS

Supreme Court

Gorin v. *U.S.* (1944)—"Reason to believe" characterized as sufficient scienter in criminal statute.

Courts of appeals

U.S. v. *Bishop* (10th Cir. 1977)—"Reason to believe" standard sufficiently precise for criminal statute to withstand vagueness attack.

U.S. v. *Achtenberg* (8th Cir. 1972)—"Reason to believe" standard sufficiently precise for criminal statute to withstand vagueness and overbreadth attack.

Schmeller v. United States (6th Cir. 1944)—"Reason to believe" criminal statute upheld; no requirement to prove specific intent.

District court

U.S. v. *Progressive, Inc.* (W.D. Wisc. 1979)—"Reason to believe" standard withstands vagueness and overbreadth attack.

GORIN v. UNITED STATES

(312 U.S. 19 (1971))

THE CASE

Gorin, a citizen of The Union of Soviet Socialist Republics, was convicted of violating sections 1(b), 2(a), and 4 of The Expionage Act of 1917 which punished copying national defense documents and furnishing them to a foreign government "with intent or reason to believe that the information obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." The Supreme Court upheld the conviction against Gorin's claim that The Espionage Act violated due process because of indefiniteness.

SUPREME COURT ON REASON TO BELIEVE

"But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute are those requiring 'intent *or reason to believe that the information to be obtained is to be used to the injury of the United States,* or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established." (27, 28) (emphasis added.)

UNITED STATES v. BISHOP

(555 F. 2d 771 (10th Cir. 1977))

THE CASE

Bishop was convicted under The Federal Sabotage Act for dynamiting four high-voltage electric line towers. The Federal Sabotage Act, 18 U.S.C. 2153(a), read in pertinent part:

"Whoever, . . . in times of national emergency declared by The President or by The Congress, . . . *with reason to believe that his act may injure, interfere with, or obstruct the United States* or any associate nation in preparing for or carrying on . . . defense activities, willfully injures, destroys, contaminates, or infects . . . any war material, war premises, or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years, or both." (Emphasis added.)

While the Court of Appeals reversed the conviction on the ground that the defendant had constitutionally insufficient notice that the U.S. was in a state of national emergency, the Court upheld the "reason to believe" standard as a sufficiently clear *scienter* standard.

COURT OF APPEALS ON REASON TO BELIEVE

"Defendant argues that Section 2151, the definition section of the Sabotage Act, and Section 2153 are void for vagueness. The vague terms are said to be 'defense activities,' 'reason to believe,' 'national emergency,' 'preparing for,' 'war material,' and 'war premises.' *United States v. Achtenberg* [citation] was concerned with the same statutory provisions we have mentioned and held that the Act is sufficiently clear to give fair notice to a normally intelligent person. We agree."

UNITED STATES v. ACHTENBERG

(459 F. 2d 91 (8th Cir. 1972))

THE CASE

Achtenberg was convicted under the Federal Sabotage Act, 18 U.S.C. 2153(a), for setting fire to the Army Reserve Officers

Training Corps building at the Washington University in St. Louis, Missouri. The Act reads in pertinent part:

"Whoever, . . . in times of national emergency declared by the President or by the Congress, . . . *with reason to believe that his act may injure, interfere with, or obstruct the United States* or any associate nation in preparing for or carrying on . . . defense activities, willfully injures, destroys, contaminates, or infects . . . any war material, war premises, or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years, or both." (emphasis added.)

Although a new trial was ordered due to the trial judge's errors in admitting evidence, the Court of Appeals upheld the "reason to believe" language against vagueness and overbreadth challenges.

COURT OF APPEALS ON REASON TO BELIEVE

"Defendant in his attack on Section 2153(a) as unconstitutional, vague and overbroad states:

" 'The vague terms are "defense activities", "reason to believe", "national emergency", "preparing for", "war material" and "war premises". Both the terms themselves and the manner in which they are interlinked or applied in the statute, create the constitutional infirmity.'

". . . In *United States* v. *Mechanic* 8 Cir., 454 F. 2d 849 (1971), we stated:

'A statute may not forbid the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. [citation] It will be found void for vagueness and overbreadth if it fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by statute. [citation] We think that Section 232, read in conjunction with Section 231(a)(3), is sufficiently clear that a normally intelligent person could ascertain its meaning and would be given fair notice of whether or not his conduct is forbidden under it.'

"We are satisfied that such test is met in our present case."

SCHMELLER V. UNITED STATES

(143 F. 2d 544 (6th Cir. 1944))

THE CASE

Schmeller and others were convicted of violating a federal statute which reads in pertinent part:

"When the United States is at war . . . whoever, *with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war,* shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall upon conviction thereof, be fined not more than $10,000 or imprisoned not more than thirty years, or both." (emphasis added.)

Although the convictions were set aside due to the trial court's failure to instruct the jury to disregard inadmissible evidence to which they were exposed, the Court of Appeals affirmed the sufficiency of the indictment under the statute.

COURT OF APPEALS ON REASON TO BELIEVE

"Under the latter part of this statute the specific intent to injure or interfere with the war effort of the United States or any associate nation need not be proved. The act of willfully making war material in a defective manner, with reason to believe that the act may injure or interfere with governmental war measures, constitutes the offense." (548)

"[Count III of the indictment] charges that with reason to believe that the United States or the associate nations would be injured, appellants willfully made the particular casting 'in a defective manner' by welding. The appellants are clearly apprised of the specific offense charged, for the casting is identified and its heat number gives the appellants the precise date. The charge that the casting was made in a defective manner is adequate, for the allegation to the effect that it was defectively made by welding is merely another method of stating that it was made by welding defectively. The indictment therefore states an offense under the statute." (549)

SUPREME COURT CASES ON THE INTERPLAY BETWEEN GOVERNMENTAL INTERESTS AND FREEDOM OF SPEECH

HIGHLIGHTS

Haig v. Agee (1981)—disclosures of intelligence operations and the names of undercover intelligence personnel are clearly not protected by the Constitution.

U.S. v. O'Brien (1968)—when speech and nonspeech elements are combined in a course of conduct, important governmental interests in regulating the nonspeech element justifies incidental limitations on the speech element.

Chaplinsky v. New Hampshire (1942)—to further important governmental interests, the government may restrict utterances that are not part of the exposition of ideas and are of slight social value as a step to truth.

Frohwerk v. U.S. (1919)—The First Amendment was not intended to immunize every possible use of language.

HAIG V. AGEE

(— U.S. —, 101 S. Ct. 2766 (1981))

THE CASE

Philip Agee, an American citizen and a former Central Intelligence Agency employee, engaged in activities abroad that resulted in identification of alleged undercover CIA officers and intelligence sources in foreign countries. In accordance with a State Department regulation issued under the Passport Act of 1926, the Secretary of State revoked Mr. Agee's passport on the ground that he was causing serious damage to the national security of the United States. The Supreme Court upheld the revocation as consistent with the Constitution and the Passport Act.

SUPREME COURT ON THE FIRST AMENDMENT (PER BURGER, C.J.)

"Assuming *arguendo* that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation. The revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel. Long ago, however, this Court recognized that 'No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of its troops.' [citation] *Agee's disclosures,* among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They *are clearly not protected by the Constitution.* The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law." (2783) (emphasis added.)

UNITED STATES V. O'BRIEN

(391 U.S. 367 (1968))

THE CASE

O'Brien burned his selective service registration certificate publicly to influence others to adopt his antiwar beliefs. He was convicted of violating a federal statute prohibiting the knowing destruction or mutilation of such a certificate. The Supreme Court upheld the conviction against a First Amendment challenge.

SUPREME COURT ON THE FIRST AMENDMENT (per Warren, C.J.)

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected speech. *This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To characterize the quality of the governmental interest which must appeal, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (376-77) (emphasis added.)

CHAPLINSKY V. NEW HAMPSHIRE

(315 U.S. 568 (1942))

THE CASE

Chaplinsky distributed literature of the Jehovah's Witnesses on the streets of Rochester, New Hampshire. A hostile crowd complained to the City Marshal that Chaplinsky denounced all religion as a racket. The Marshal replied that Chaplinsky's activities were lawful, but advised Chaplinsky that the crowd was becoming restless. Subsequently, a disturbance occurred and a nearby policeman started with Chaplinsky for the police station. En route to the station they encountered the City Marshal to whom Chaplinsky stated "you are a god damned racketeer," "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Chaplinsky was convicted of using provocative offensive words directed at a person in a public place. The Supreme Court upheld the conviction against Chaplinsky's claim of protection for the speech under the First Amendment as made applicable to the States by the Fourteenth Amendment.

SUPREME COURT ON THE FIRST AMENDMENT (PER MURPHY, J.)

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limit-

ed classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of the exposition of any ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*" (572-73) (emphasis added.)

FROHWERK v. UNITED STATES

(249 U.S. 204 (1919))

THE CASE

Frohwerk was convicted of conspiracy to obstruct military recruiting in violation of the Espionage Act of 1917. He published the *Missouri Staats Zeitung* advocating that the members of the U.S. armed forces mutiny. The Supreme Court affirmed the convictions against a First Amendment free speech challenge.

SUPREME COURT ON THE FIRST AMENDMENT (PER HOLMES, J.)

"[T]he First Amendment while prohbiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. [citation] We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." (206)

DEBS v. UNITED STATES

(249 U.S. 211 (1919))

THE CASE

Debs was convicted of advocating in a public speech that members of the armed forces should refuse to fight, in violation of the Espionage Act of 1917. The Supreme Court upheld the conviction against a First Amendment free speech challenge.

SUPREME COURT ON THE FIRST AMENDMENT (PER HOLMES, J.)

"The defendant [Debs] addressed the jury himself, and while contending that his speech did not warrant the charges said 'I have been accused of obstructing the war. I admit it. Gentleman, I abhor war. I would oppose the war if I stood alone.' The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general, but this war, and that the oppostion was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief." (214, 215)

SCHENCK v. UNITED STATES

(249 U.S. 47 (1919))

THE CASE

Schenck and others were convicted of conspiring to obstruct recruiting and enlistment by mailing printed circulars to draftees urging them to evade the draft, a violation of the Espionage Act of 1917. Schenck claimed the protection for his speech of the First Amendment. The Supreme Court upheld the conviction against a First Amendment free speech challenge.

SUPREME COURT ON THE FIRST AMENDMENT (per Holmes, J.)

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.[citation] The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. [citation] *The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. it is a question of proximity and degree.*" (52) (emphasis added.)

Addenda

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (passport denial to citizen stripped of citizenship for draft evasion invalidated):

". . . [W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."

Broadrick v. *Oklahoma*, 413 U.S. 601, 611-12 (1973) (First Amendment challenge to ban on political activity by State employees):

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society."

CBS v. *DNC*, 412 U.S. 94, 102-3 (FCC Fairness Doctrine on access to media upheld against First Amendment challenge):

"Professor Chafee aptly observed: once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular works of the government."

CARTER ADMINISTRATION POSITION ON "SPECIFIC INTENT" STANDARD

Mr. CHAFEE. Mr. President, there has been a lot of debate on the issue of the "specific intent" standard which the Judiciary Committee adopted by a very narrow margin as its language in subsection 601(c), and the "reason to believe" language that Senator JACKSON and I have incorporated in our amendment.

The reasons for these differences in language arise out of the debate we had on this issue 2 years ago. It seems to me this is extremely important, Mr. President, and I believe this gets to the heart of one of the problems we have here.

In January of 1980, over 2 years ago, Senator JACKSON and I joined Senators MOYNIHAN, NUNN, DANFORTH, DOMENICI, and others in introducing the Intelligence Reform Act of 1980 which was then S. 2216. This bill contained a section designed to protect agents' identities which depended on a "specific intent" standard. In other words, the bill we originally introduced had the "specific intent" standard which Senator BIDEN is defending from my amendment now.

In hearings before the Senate Intelligence Committee in June of 1980 a number of witnesses expressed concern with the "specific intent" standard.

For example, the Carter administration's principal witness at our hearings, Mr. Robert F. Keuch, Associate Deputy Attorney General—he was appointed by the prior administration—argued very strongly against the "specific intent" requirement, and this is what he had to say:

Section 501(b) specific intent requirement that an individual must have acted with intent to impair or impede the foreign intelligence activities of the United States, and that such intent cannot be inferred from the act of disclosure alone, is not a fully adequate way of narrowing the provision either in serving the First Amendment values or in facilitating effective prosecutions.

The specific intent requirement may itself have the effect of additionally chilling legitimate critique and debate on CIA policy because general criticism of the intelligence community could seem to corroborate an intent to impair or impede.

Now, Mr. Keuch is saying so far that the "specific intent" requirement, which is the language in the committee version that is on the floor here and which was the language we originally considered 2 years ago, could chill legitimate criticism of the CIA, because general criticism of the CIA could seem to then corroborate an intent to impair or impede the intelligence activities of the United States.

Mr. Keuch goes on in his statement:

A mainstream journalist, who occasionally writes stories based on public information concerning which foreign leaders are thought to have intelligence relationships with the U.S., may fear that such stories about foreign leaders and other stories by him critical of the CIA will be taken as evidence of an intent to impede foreign intelligence activities.

Speculation and debate concerning intelligence activity and actors would seemingly be more hazardous if one had taken a general position critical of the conduct of our covert foreign intelligence policy.

Mr. Keuch continues:

Taking the problem from the other direction, since any past or present criticism of the CIA might provide the something extra beyond the act of disclosure to prove specific intent, citizens soon may be unwilling to hazard a speculative discussion of covert intelligence policy for fear they will unwittingly name an intelligence source correctly.

The specific intent requirement also can hamper effective enforcement by creating a difficult jury question. Any person willing to gamble on the outcome of a prosecution can claim to a jury that his intent was to inform the American people of intelligence activities he believed to be improper or unnecessary rather than to disrupt successful intelligence gathering. The Government may often find it difficult to convince a jury beyond a reasonable doubt that there was intent to impede in the light of such a claim.

Mr. Keuch continues:

A related serious enforcement problem is that the serious intent enforcement problem could provide an opening for defendants to use the trial as a forum to demon-

strate alleged abuses by the intelligence community or to press for disclosure of sensitive classified information on the ground that it was relevant to show their intent was to inform rather than to disrupt. The Justice Department is concerned that the specific intent element will facilitate graymail efforts to dissuade the Government from prosecuting defendants.

Mr Keuch continues:

In my appearance last January I was asked by the House Intelligence Committee whether the Department believes section 501(b) of H.R. 5615 or S. 2216 would be held constitutional. Our sincere answer has to be that we do not know.

In other words, he was not sure that the "intent" standard would stand up to, withstand, the constitutional challenge. That is the end of Mr. Keuch's quote.

Now, Mr. President, just let me summarize what Mr. Keuch said to the Intelligence Committee nearly 2 years ago. He testified as follows: First, that the "specific intent" requirement may chill legitimate critique and debate on CIA policy.

Second, he said that the specific intent requirement could hamper effective prosecution by making a very difficult jury question.

Third, he said the specific intent requirement would facilitate "graymail" efforts.

Let me explain the word "graymail." "Graymail" is a threat that if you prosecute a defendant, the defendant will demand large quantities of CIA documents or information on activities be disclosed. He will require this as part of his defense. The so-called "graymail" technique occurs quite frequently when the Government tries to prosecute those guilty of handling documents to foreign nations. For example, the defense will say, "In order to prove our defense, we request the Government to reveal all intelligence documents they have on this subject." And the Government says, "We don't want to reveal those." Thus, the defendant will plead to a lesser sentence; either he will go free completely or he will get some minor punishment. That is what we call "graymail."

Mr. Keuch worries about the "graymail" threat if this specific intent language remains in the legislation.

Fourth, and finally, Mr. Keuch, says that the Carter administration Justice Department does not know whether the specific intent requirement would be upheld as constitutional.

Other witnesses who appeared before our committee in 1980, such as Mr. Lloyd Abrams, who defended the New York Times in the Pentagon papers case, and Mr. Morton Halperin, of the ACLU, expressed similar concerns about the specific intent requirement.

On the basis of these expressed concerns, the Senate Intelligence Committee Staff and the Justice Department began working on an alternative standard of proof which would remove the problems of the specific intent standard. In other words, we wrestled with the specific intent difficulty that was brought up, and we saw the problems that were raised, as pointed out by Mr. Keuch. That was the language we originally had in the act by we changed it because of the objections that were raised. We came up with the language which utilized this objective standard, this reason to believe language.

The Carter administration Justice Department endorsed this language. In a letter to Chairman Bayh—who was then chairman of the Senate Intelligence Committee—Deputy Attorney General Renfrew wrote as follows about the objective standard:

This formulation substantially alleviates the Constitutional and practical concerns expressed by the Justice Department with regard to earlier versions of this bill that included a requirement that prohibited disclosures be made with a specific "intent to impair or impede" U.S. intelligence activities.

Because of the significance of this matter, however, it has been our view from the beginning that such legislation as is enacted must be fair, effective and enforceable. Our position has been and remains that the absence of an intent element in this legislation will accomplish this goal.

That is the end of the quote by Mr. Renfrew, Deputy Attorney General under the prior administration of President Carter, to Chairman Bayh.

Mr. President, the language of the amendment, the Chafee-Jackson langage, for this subsection is the only language that has been endorsed by the Carter and the Reagan administration Justice Departments. The issues which this legislation involves have been heard in detail, and our wording of S. 391 has been carefully amended and refined to its current state.

If the Senate goes back to the specific intent standard, which the Judiciary Committee narrowly adopted, we will be going back to a standard which the Carter administration Justice Department declared inadequate over 2 years ago. This simply does not make sense.

THE HOSTILE "MOLE"

Mr. President, I would like to now address the issue of the so-called "mole" within the CIA, which the distinguished Senator from Delaware has dealt with in a hypotetical which he raised on this floor and during hearings on the Intelligence Identities Protection Act.

The Senator from Delaware said that the reason to believe language would prevent exposure of a hostile "mole" within the CIA. It seems to me preposterous to suggest that the Chafee-Jackson language would prevent "mole" from being exposed. It seems to me that a journalist in the "mole" hypothetical would not be prosecuted under the terms of my amendment for the following reason:

First of all, it is not at all certain that "mole" identified would be a covert agent, as that term is precisely defined in the bill. The "mole" may be an overt CIA employee. As such, his identity would not be classified information under the definitions in subparagraph 606(4), and the United States would not be taking "affirmative measures to conceal such individual's classified intelligence relationship." Accordingly, no prosecution would be brought for such a disclosure.

There is no reason to assume in this case that the hypothetical journalist would have the requisite reason to believe that his disclosure would impair or impede the foreign intelligence activities of the United States. Disclosure of the identity of a real "mole" would not impair or impede but, rather, assist the foreign intelligence activities of the United States.

Finally, there is nothing in S. 391 that would prevent the journalist from publishing his story about the penetration without identifying the "mole." Section 602(d) expressly states that it is not an offense to transmit the identification to the Intelligence Committees, the one in the House and the one in the Senate. And, in fact, this would be an ideal route for the journalist to take since efforts that then might have been made to double the "mole" to the benefit of the United States.

This act encourages disclosure of information to the committees themselves. In a case where a journalist thinks he has spotted a "mole," notification of this fact to the congressional Intelligence Committees would be the best course of action. In any case involving a "mole", and individual thought to be a "mole" might, in fact, already have been doubled and working for the United States. In such circumstances, his exposure could, in fact, gravely impair U.S. intelligence activities.

NEGLIGENCE AND GREYMAIL ISSUES

Mr. President, the junior Senator from Indiana stated on January 25 of this year that, in his judgment, the Chafee-Jackson language was a negligence standard and it also creates what we call "greymail" problems. In other words, the junior Senator from Indiana was raising the "greymail" problem as it pertained to the language we had, the so-called reason to believe language. Now, let me discuss this a minute.

This is what the junior Senator from Indiana had to say:

First of all, intent is the appropriate element for a criminal statute. Reason to believe implies a negligence standard and this is not a negligence standard substitute.

Second, the objective "reason to believe" standard: "what would a reasonable man believe would be the results of his actions," raises serious prosecutiorial questions. For example, it would force the Government to make public at the trial more classified information than it would want to and certainly more than it requires in a prosecution under the "intent" standard.

The junior Senator from Indiana, thus, is arguing that it is easier to prosecute under the intent standard,

and that serious difficulties would be raised with the reason to believe.

Well, Mr. President, reason to believe is not a negligence standard. An examination of all of the elements of proof required in the Chafee-Jackson amendment makes it clear that reason to believe does not mean that a negligence disclosure of an identity would be a criminal offense. Why is this so? How can I say that a negligence disclosure of an identity would not be a criminal offense?

First of all, the individual making the disclosure must know that the information he discloses does, in fact, identify a covert agent.

That is the first thing. The person making the disclosure must also note that the United States is taking affirmative measures to conceal the agent's classified intelligence affiliation. Moreover, the disclosure must be in the course of a pattern of activities intended to identify and expose covert agents.

And finally, the person making the disclosure must have reason to believe his activities would impair and impede foreign intelligence activities in the United States.

All these elements must be proved. An individual making an unauthorized disclosure under these circumstances can hardly claim negligence. It is completely fallacious to argue that standing alone "reason to believe" is the same as negligence because "reason to believe" does not stand alone in subsection 601(c). It is preceded by five other elements, all of which must be proved beyond a reasonable doubt.

During the Senate Judiciary Committee's markup of the legislation that we are considering on October 6 of last year, Senator LEAHY raised this issue of negligence, and he directed his question to Mr. Richard Willard, the Attorney General's counsel for Intelligence Policy. Senator LEAHY directed the following question:

Can you tell us, is this or is this not a negligence standard?

The response by Mr. Willard who, as I mentioned, was the Justice Department's expert on intelligence law, was as follows:

If the reason to believe standard stood by itself and were the only element of this offense, I believe you are correct, that it would in many ways resemble negligence. However, as Senator Heflin pointed out, there are so many elements of proof in this section as it exists that there is no way someone could accidentally or negligently violate the law. It would be very difficult to prosecute. There are other elements, including one of specific intent intended to identify and expose covert agents which exist in Senate Chafee's bill. Therefore, while that one provision, taken in isolation, would be sort of a negligence standard, it is accompanied by five other elements which involve actual knowledge and specific intent.

The distinguished junior Senator from Indiana is speaking about "reason to believe" as if it were the only standard of proof in the bill. We must not allow our focus on the differences between "reason to believe" and "intent to impair or impede" to obscure the fact that we are talking about one of six elements of proof required by the amendment I have submitted and by the legislation that has passed the House. All of these elements must be proven beyond a reasonable doubt. Comparing the "reason to believe" standard to a negligence standard is meaningless, because the comparison ignores the five additional elements of proof which must be present before "reason to believe" is even considered.

Mr. President, the junior Senator from Indiana also suggested "reason to believe" would lead to greater pressures to reveal classified information at the trial—in other words, the so-called grey mail problem—and it would chill prosecutorial efforts.

That simply is not the case. In fact, it is just the opposite. The subjective intent standard would have those difficulties.

Under the intent to impair or impede standard a defendant could press for disclosure of sensitive classified information on the grounds that it was relevant to a showing that his intent was to expose alleged abuses rather than to impair or impede intelligence activities.

The "reason to believe" standard avoids this problem by focusing on overt acts rather than on some subjective state of mind.

The whole question of greymail was raised over 2 years ago when the Carter administration Justice Department testified before the Senate Intelligence Committee. At those hearings, Mr. Robert Keuch, Assistant Deputy Attorney General in the Carter administration, said:

A related serious enforcement problem is that the specific intent requirement could provide an opening to defendants to use the trial as a forum to demonstrate alleged abuses by the intelligence community, or to press for disclosure of sensitive, classified information on the ground it was relevant to showing their intent was to reform rather than to disrupt.

The Justice Department is concerned that the specific intent element will facilitate greymail efforts to dissuade the Federal Government from prosecuting offenders.

Mr. President, the Justice Department has a great deal of expertise on the subject of greymail. I would suggest that if the Justice Department supports the Chafee-Jackson language rather than the specific intent language because of greymail problems, we ought to listen to them. They are expert on these matters.

MISINFORMATION IN DEBATE

Mr. President, on March 1 of this year, the junior Senator from Vermont noted that a considerable amount of misinformation had entered into the debate on the Intelligence Identities Protection Act. Senator LEAHY declared that the amount of misinformation in the debate was so great that some kind of prize might be in order. I believe the Senator from Vermont was correct and the misinformation campaign continues. The prize which Senator LEAHY spoke about might well be awarded to the New York Times for its editorial of March 4, 1982, called The Spy Bill Wrapped in the Flag.

Mr. President, at this time I ask unanimous consent that a copy of this editorial from the New York Times of March 4, 1982, be printed in the RECORD. First, however, I would like to read excerpts from it.

The Times had this to say:

THE SPY BILL WRAPPED IN THE FLAG

The closer the Senate gets to voting on the "Intelligence Identities Protection Act," the clearer it becomes that this bill dangerously exceeds its announced purpose. It was prompted by former agents who break their oaths and expose American secret agents in risky intelligence work. But Congressional anger soon spread to individuals who never worked for the Government but engage in similar exposures using publicly available information. And that, in turn, has raised concern about the possible use of the act against news organizations.

If there was any doubt that the act extends that far, it has now been put to rest. Senator John Chafee, a chief sponsor, has clarified the bill's threat to conventional journalism—and public discussion generally.

Asked whether a prosecutor could use the bill against reporters and news organizations for exposing crimes and abuses by agents and informants, the Senator has this reply: "I'm not sure that The New York Times or The Washington Post has the right to expose names of agents any more than Mr. Wolf or Mr. Agee," two of the bill's main targets. "They'll just have to be careful about exposing the names of agents."

And then it goes on with severe criticism of Senator CHAFEE. The article continues:

Unfortunately, to cite a case in The Times's experience, being careful doesn't help decide how to deal with former spies like Edwin Wilson and Frank Terpil. The Times put together—carefully—stories about how the former agents trained terrorist abroad and engaged in suspicious weapons and technology deals. The stories raised questions about the former spies' connections to the Central Intelligence Agency, whether real or feigned.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

[From the New York Times, Mar. 4, 1982]

THE SPY BILL WRAPPED IN THE FLAG

The closer the Senate gets to voting on the "Intelligence Identities Protection Act," the clearer it becomes that this bill dangerously exceeds its announced purpose. It was prompted by former agents who break their oaths and expose American secret agents in risky intelligence work. But Congressional anger soon spread to individuals who never worked for the Government but engage in similar exposures using publicly available information. And that, in turn, has raised concern about the possible use of the act against news organizations.

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Senator Chafee makes the bill's danger explicit without seeming to understand its cost to public discussion of security issues. Perhaps inadvertently, he makes the case for trimming back this inflated piece of legislation. No assurances that the law would be carefully administered can suffice when the warning to reporters is: be careful about getting the Government mad.

Unfortunately, to cite a case in The Times's experience, being careful doesn't help decide how to deal with former spies like Edwin Wilson and Frank Terpil. The Times put together—carefully—stories about how the former agents trained terrorists abroad and engaged in suspicious weapons and technology deals. The stories raised questions about the former spies' connections to the Central Intelligence Agency, whether real or feigned.

At a minimum, these foreign adventures challenged the country's ability to avoid embarrassment by once-trusted employees. The stories brought about other investigations, by Congress and the C.I.A. itself.

But it doesn't seem to matter how much care went into those stories. It doesn't matter how much they have been supported by official investigations. None of that would protect the paper against a wrathful prosecutor armed with the pending bill.

The Senate should restrict it to the punishment of people like Philip Agee, the former spy who first specialized in agent exposure. Congress cannot reach private citizens like Louis Wolf, publisher of the Covert Action Information Bulletin, without chilling other, more precious journalism and debate. In no case can the Senate responsibly follow the House's reckless example and make it a crime to identify an agent without even requiring proof of criminal intent.

Until now, the Reagan Administration has managed to wrap this bill in the flag. That conceals its danger to liberty—and to the public knowledge on which true national security rests. There is a difference between patriotism and chauvinism. Senators Biden, Bradley, Leahy, Specter and Quayle have been in the forefront of those who have exposed at least some of the bill's excesses. The entire Senate needs equal courage and wisdom.

Mr. CHAFEE. In other words, Mr. President, the New York Times editorial tries to tell us the recent series of articles done by the Times on the activities of former CIA officers, and they identify them in the editorial, Edward Wilson and Frank Terpil, could not have published if the identities bill had been law at that time.

Mr. President, in a previous discussion with the Senator from New Jersey (Mr. BRADLEY), I had occasion to discuss the definition of "covert agent" in this legislation. Senator BRADLEY cited a number of newspaper articles and asked whether or not the authors would have been liable to prosecution under the Chafee-Jackson amendment. In each case, I told Senator BRADLEY that the answer to his question was contained in the definition of "covert agent" which appears on page 7 of the committee bill—of the committee bill—as reported. This definition makes it absolutely clear that S. 391 defines the term, "covert agent," to mean only current CIA officers of employees whose identity as such officers or employees is classified and who are actually serving outside the United States or have done so within the last 5 years.

The definition of "covert agent" goes on to include certain other individuals who are not citizens of the United States whose past or present intelligence relationship to the United States is classified. These are the people who are normally called agents in the intelligence community.

The definition of a covert agent also includes certain U.S. citizens residing or acting outside the United States and who are associated with foreign counterintelligence or foreign counterterrorism components of the FBI.

The point I wish to emphasize is simply that former CIA agents are not covered by the definition of "covert agent."

I might say, Mr. President, that applies to whether the intent language or the "reason to believe" standard is used. That has nothing to do with the Chafee amendment. I do not quite see why the Times editorial goes after Senator CHAFEE on this particular point, because both bills use the same definition.

Oddly enough, Mr. President, the Times editorial goes on to say that the Reagan administration has managed to wrap this bill in the flag.

Until now, the Reagan Administration has managed to wrap this bill in the flag. That conceals its danger to liberty—and to the public knowledge on which true national security rests. There is a difference between patriotism and chauvinism. Senators Biden, Bradley, Leahy, Specter and Quayle have been in the forefront of those who have exposed at least some of the bill's excesses.

Oddly enough, Mr. President, each of those gentlemen is supportive of the legislation as it incorporates the language they are for, namely, the intent standard, yet the New York Times is critical of the whole bill. So it is odd that they are so generously praised, but I am glad that the Times saw fit to praise some of us here in the Senate.

It seems to me, Mr. President, that the debate over this bill, whether on the floor of this body or in the editorial pages of influential publications, should at least be based on what the bill says. Certainly, the New York Times should have someone on its staff who is capable of reading the bill and coming to the inescapable conclusion that neither the Judiciary Committee version of the bill nor the Chafee-Jackson amendment has anything to do with preventing the naming of former CIA officers who might be engaged in illegal or otherwise nefarious activities. The bill does not cover former CIA officers. It is disconcerting to listen to the recitation of articles which have been published in the past and which, it is alleged, could not have been published had the identities bill been law at the time.

We have dredged out these articles and, in every case, the allegation can be disposed of simply by referring to the definitions in the legislation. In almost every case, the name revealed in the article was that of a former CIA officer not covered by the definition or of a U.S. citizen residing in the United States who is also not covered by the definition of a covert agent.

Mr. President, the Senator from Delaware appears to understand and accept the fact that, in the language I have presented, an individual must engage in a pattern of activities intended to identify and expose covert agents.

Let me quote from Senator BIDEN's statement of March 1. Senator BIDEN was discussing the Chafee-Jackson amendment, and he stressed that it contains several key elements. As Senator BIDEN put it:

First, a pattern of activities; second, with an intent to identify or expose; and, third, with a reason to believe that the activity would impair or impede the foreign intelligence activities of the United States.

Senator BIDEN went on to say:

In the intent to identify or expose, the intent goes to the identification not the motivation.

Mr. President, that is absolutely correct. The intent element in the Chafee-Jackson language is a pattern of activities intended to identify and expose covert agents. Senator BIDEN has emphasized that it is theoretically possible to be prosecuted under the Chafee-Jackson language for exposing the name of a single covert agent, so long as an individual engaged in a pattern of activities prior to the disclosure.

The point that Senator BIDEN keeps missing, however, is the key point contained in my exchange with Senator DURENBERGER on March 3, 1982. In that exchange, Senator DURENBERGER and I discussed Senate Report 96-896, which is the only legislative history of the Chafee-Jackson language. This is the Intelligence Committee report on the identities bill that was pending in the 96th Congress. I urge my colleagues to read the colloquy between Senator DURENBERGER and me in order to understand that the intent requirement of the Chafee-Jackson language, the requirement that an individual engage in a pattern of activities intended to identify and expose covert agents, effectively limits the coverage of the identities bill to those engaged in the purposeful enterprise of revealing names; that is, to those in the business of naming names.

Mr. President, the matter before us is a critical one, and I urge my colleagues to treat with great care and more than a few grains of salt the arguments that have been raised against

the Chafee-Jackson amendment. In many cases, as I have tried to show, misinformation and misconceptions have crept into the public debate on this issue. We should not be misled by this.

RICHARD S. WELCH MEMORIAL FUND

In conclusion, Mr. President, I should like to state that probably this legislation had its birth in the execution, or murder, that took place of Richard Welch, a CIA station chief in Athens, Greece, who was shot in front of his home as he returned from a Christmas party at the American Ambassador's home. He had attended a Christmas party in December 1975, at the Ambassador's home and, as Mr. Welch returned to his own home, his quarters in Athens, he was executed—murdered. That assassination occurred within a month of the time that he was publicly identified as the CIA station chief in the Athens Daily News. That information in the Athens Daily News came from Phillip Agee's Counterspy magazine.

I have special feeling for this murder, Mr. President, because Mr. Welch's family comes from my State of Rhode Island. Richard Welch grew up in Providence, where he was an honor student at Classical High School. He was a member of the track team. He went on to Harvard. He graduated in 1951 magna cum laude, with a degree in Greek and classical languages.

What a prize. What a man to have in our CIA. Welch's mother and wife were both from Rhode Island and a brother and sister of his still live there. His uncle was a probate judge in one of our towns and a former clerk in the family court.

Richard Welch was not somebody in a trenchcoat, wandering around, as many CIA officers are characterized incorrectly. He was, as many CIA officers are, a well-educated, able, and intelligent family man. He gave up what could have been an easy life at home for an important, though dangerous, series of assignments overseas for this Nation and for us. We sent him there.

We, the Members of Congress, have set up the CIA. We have supported it with funds. We encourage the recruitment of young American men and women to go into the CIA, and we recognize that they will be sent abroad on dangerous missions.

Richard Welch believed in the primary purpose and mission of the CIA, which is to collect foreign intelligence so that the U.S. policymakers can make informed judgments here at home. He died for those beliefs because a small clique of individuals make their living by naming names.

Last week, I was pleased to receive a letter from Harvard University stating that a Richard S. Welch Memorial Fund is being established at Harvard for the consideration of intelligence and its role in the formulation and implementation of U.S. policy. That fund will be jointly administered by the John F. Kennedy School of Government and the Center for International Affairs at Harvard. The purpose of this endeavor is to enhance the national understanding and appreciation of the role of intelligence in our Nation.

Mr. President, I can think of no more timely opportunity for this memorial fund to be established. Nor can I think of any better way to honor this intelligent and patriotic U.S. citizen, than to pass the legislation which will effectively prevent the pernicious activity of "naming names." After all, that activity was responsible for Richard Welch's murder.

Mr. President, I ask unanimous consent to have printed in the RECORD the letter from Harvard in connection with this memorial fund for Richard Welch.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

RICHARD S. WELCH MEMORIAL FUND,
HARVARD UNIVERSITY,
Cambridge, Mass., December 1981.

DEAR SENATOR CHAFEE, Dick Welch '51 died at the hand of an assassin in Athens on December 23, 1975. Since then, many of us have sought a way to remember that brightest and wittiest of spirits, that consummate professional, that warmest of friends, that special man.

Now we have the way. We are establishing the Richard S. Welch Memorial Fund at Harvard for the consideration of intelligence and its role in the formulation and implementation of U.S. policy. Through this endeavor to enhance the national understanding and appreciation of the intelligence function, we commemorate Dick in a combination of three of his great loves: his college, his profession, and his quest for understanding in the cause of the United States.

Harvard's Kennedy School of Government and Center for International Affairs will jointly oversee the use of the money from the Fund, under the direction of their respective chiefs, Graham Allison and Samuel Huntington, and three others.

The prime aim of the Memorial Fund will be to encourage teaching and talking about intelligence—with students, government officials, and others, at Harvard and across the country. The subject matter will be the rational and historical importance and contribution of intelligence in the making of informed foreign and national policy. We look forward to cooperation between those working at Harvard under the aegis of the Memorial Fund and those teaching and talking about intelligence elsewhere.

Dick Welch honored us by his life and death. Now we may honor him by perpetuating his memory in behalf of the causes he cherished. We ask you to join us—our immediate goal is $50,000. Please make checks payable to the Richard S. Welch Memorial Fund, and send them to Dean Bayley Mason at the Kennedy School, address above. All contributions are tax-deductible, and are credited to the current Harvard Campaign. We also ask you to send a copy of this letter with your personal note to others who knew and/or esteemed Dick and what he stood for. We shall keep you advised of the progress of the Fund and plans for its use. Thank you.

Sincerely,

JOHN A. BROSS.
CHRISTOPHER MAY.

(Mr. DURENBERGER assumed the chair.)

Mr. CHAFEE. Mr. President, some of my colleagues have mentioned the case of Richard Welch and the case of the Kinsman family. It will be recalled that the Kinsman family, on July 4, 1980, was stationed in Jamaica. His name was published. He was alleged to be a CIA officer. His license number, his street address, and the color of his car were published in one of these bulletins. His house was shot up and an explosion took place. A bomb was thrown on his lawn. Fortunately, no one was hurt. That was lucky. Bullets went through his house, through his young daughter's bedroom. Fortunately, she was not in the house at the time.

There are others whose careers were ruined because no longer can they carry out the missions for which they have been trained and for which this Nation needs them.

It is important to understand that this activity is not something that took place only in the case of Welch and Kinsman. It is taking place constantly, and it is important to understand that.

Two weeks ago, in Managua, Nicaragua, an American political officer was the subject of official harassment because he was identified as a CIA agent serving in the Embassy. This incident was described in a recent article by Roy Gutman in Newsday, a newspaper published on Long Island with which many of us are familiar. I ask unanimous consent that this excellent article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From Newsday, Mar. 12, 1982]

BAN ON NAMING AMERICAN SPIES NEARS SENATE OK

(By Roy Gutman)

WASHINGTON.—On the pretext of a traffic violation, Nicaraguan police halted the U.S. Embassy car on the side of a public highway in Managua. They seized the driver's license and car registration. State security men arrived an hour later. When the embassy officer refused to accompany them, police took the driver and car away, leaving the officer on the street.

The incident, as reported in a U.S. Embassy cable a little over two weeks ago, ended peacefully. The driver was interrogated for two hours, and the car taken apart and searched. By contrast, between Nov. 6 and Dec. 16, three women employees at the embassy were assaulted, bound and gaged by armed men who overpowered guards and broke into their homes in Managua.

What all four had in common is that they were listed as CIA agents in a progovernment Managua newspaper on Nov. 6. A few weeks before the publication, Philip Agee visited Managua and charged at a press conference that at least 10 CIA agents were "hiding" in the embassy's political section.

The former CIA agent, who has been deprived of his passport and is now reported to be living in Greece, did not list the names but said they "are probably in the hands of state security already." The embassy re-

fused to say whether or not the people named were, in fact, agents.

Successive administration and CIA directors have pleaded for laws to punish Agee and the handful of other former agents or private citizens connected with the Covert Action Information Bulletin who have made names for themselves by naming others.

Now the Senate is on the verge of approving the "Names of Agents" bill. Support is overwhelming (the House voted 354-46 for it in September), and there is no question it will pass. The debate is over the spillover effect on investigative journalism in this country.

The bill before the Senate would set penalties of up to $50,000 in fines and 10 years' imprisonment for disclosure of names of CIA agents by a former government employee and up to $15,000 and 3 years in prison for disclosure by a private citizen.

While "getting the bad guys," as Sen. Joseph Biden (D-Del.) put it in a Senate debate last week, has wide support in Congress, in the civil liberties community and among many constitutional lawyers, editors and publishers, the bill is viewed as an attempt to use a sledge-hammer to smash a gnat.

The American Civil Liberties Union has called the bill unconstitutional and a threat to the First Amendment guarantee of freedom of speech. But as the bill seems likely to pass, the ACLU has backed efforts by Biden and a majority of the Senate Judiciary Committee to insert more restrictive language in it.

At the heart of the Senate debate so far is whether the bill would discourage reporting such as the New York Times series last year that revealed that ex-CIA agents Frank Terpil and Edwin Wilson had trained terrorists on behalf of Libyan leader Moammar Khadafy.

The Times editorialized recently that no matter how much those reports served the U.S. public interest, "a wrathful prosecutor armed with the pending bill" could attack the newspaper for publishing them.

Of such concerns, the bill's chief sponsor, Sen. John Chafee (R-R.I.) said: "That is absolute nonsense. The people who say this have not read the legislation. Wilson and Terpil were former agents, and disclosure of their names would not be penalized under this bill."

The rebuttal that Terpil and Wilson still claim to be CIA informants and might be considered current agents, thereby triggering the law, has not yet been addressed in the Senate debate. But staff aides to the Senate Intelligence Committee said the CIA had flatly denied that the two men were still connected with the agency in any way.

Biden wants the law to require proof that the revelation of an agent's name was intended to harm foreign intelligence-gathering. The Chafee version, backed by the White House, would require only the judgment that damage was done. Each claims that his version is the more protective of legitimate journalistic enterprise.

Senate Intelligence Committee staff chief Rob Simmons said he though Chafee had the votes at the moment. The Biden move, if successful, might cripple the bill's chances by forcing a conference with the House, which already adopted language similar to Chafee's "If we have a conference on this issue, we may not have a bill this session," he said.

Mr. CHAFEE. Mr. President, it is my understanding that there will be no votes today. It is our hope that we can get a vote on this matter tomorrow.

I hope that before we do vote, Members will take the occasion to read and study the record of this matter. I have discussed this with the principal manager on the other side, the Senator from Delaware (Mr. BIDEN). It is our hope, too, that we can have perhaps an hour and a half, evenly divided, before we vote on the amendment, then vote on the amendment, and then vote on the bill.

I urge my colleagues to support the amendment and the bill. If we do so we are confident that we will have legislation in this matter.

If the amendment is defeated and the bill is passed, it will be quite different from the measure that has passed the House.

Mr. LONG. Mr. President, will the Senator yield?

Mr. CHAFEE. I yield.

Mr. LONG. I should like the Senator to help me focus my view on the issue that will be in dispute on the bill. It is my understanding that the Senator's view is that it should be against the law for an American to needlessly identify one of the agents of the CIA, particularly an agent who tends to try to gather information on a covert basis for the United States.

Do I correctly understand that one of the most controversial features is the question of whether the person who identifies the CIA agent should do so with the intent to adversely affect the security of the United States, or whether it should be adequate that to identify the agent should become a crime against the laws of the United States, without requiring the showing of an intent?

Mr. CHAFEE. I am not trying to draw out my answer, but the answer to the first question is this: The committee bill has language which states:

Whoever, in the course of an effort to identify agents, with the intent to impair or impede the foreign intelligence—

The language of the amendment I have presented says:

Whoever, in the course of a pattern of activities intended to identify an agent—

So there is an intent standard at that point. I continue:

and with reason to believe that these activities would impair the intelligence activities of the United States.

So the whole difference does not hang on the reason to believe versus the intent. I believe it would be an inadequate explanation of the difference to say that the difference is solely that.

Mr. LONG. Then, the Senator suggests that the law would place a burden on this Government to prove that there was an intent on behalf of the perpetrator to adversely affect the security of the United States.

Mr. CHAFEE. Under the committee language.

Mr. LONG. But I want to know what the Senator's position is, what he is advocating in this regard.

Mr. CHAFEE. What I am advocating is that the existing language in the committee bill; namely, "Whoever, in the course of identifying an agent, with an intent to impair or impede the United States" is chilling to the newsman who publishes a series of articles critical of the CIA, or of U.S. intelligence activities. He has built up a background which would be indicative of his intent to impair or impede, when it would not really be germane to what he has done.

In other words, when you go into somebody's intent in a matter such as this, it is harmful to the person, and it is difficult for the prosecution as well.

It is difficult for the prosecution, because the defendant says:

True, I disclosed the names of these agents. Admittedly, I publish the "Covert Action Information Bulletin." I revealed Mr. Welch's name. But my intent was not to impair or impede the intelligence activities of the United States. My intent was to improve them, because these people are spoiling the reputation of the United States by what they are doing in Nicaragua or Athens, Greece, or wherever it is. They are impairing the United States. Thank goodness for me, the publisher of these documents, because I am helping our Nation.

Not only is that a defense that could be undertaken, but, indeed, it is what they are presently saying. That is one side of it. That is looking at it from the standpoint of the Government's perspective.

Look at it from the other side, from the side of a newsman who discloses the name of an agent inadvertently. But who has been extremely liberal, let us say. He thinks that everything the United States has done is wrong and that the CIA has misbehaved. He has published a long series of articles on that. He also has pointed out that the Justice Department is crooked. They are for sale. They are bad actors. He is critical, critical, critical. Then, inadvertently, he discloses the name of an agent.

He is prosecuted, and the prosecution says his intent is clear, and they bring in all these articles from the past to show his intent.

In my judgment that is chilling on writers and journalists. The reason to believe language is an objective standard. We ask whether a person would have reason to believe that the disclosure impedes the United States, rather than try to get within the breast of the defendant and ask what was his intent?

Mr. LONG. I think the Senator has a good point. It seems to me that it would provide very little protection for our agents if all one had to do was to indicate that he has no sympathy whatever for the CIA, he does not think there should be a Central Intelligence Agency; he thinks it has done a horrible job and should be abolished.

Therefore, one could well argue, and I would think with logic, feeling that way, that it should be abolished, it should not operate at all. There should be no CIA; that under those circumstances if he publishes the names of every agent of whom he had any knowledge and even if he had

once been in the CIA and knew a lot of agents he could take the view he was not seeking to undermine the security of the United States; what he was doing, according to him, would be to further protect the security of the United States because he does not think we should fight a war with anyone and that the CIA was likely to create a war rather than prevent one.

So if one wanted to take that point of view, he could very well take the view that he is not guilty of crime at all; he is simply doing what he thinks is right and his intention is not to violate the security of the United States, his intent is prevent the United States from fighting anybody or even defending itself against anybody.

I can see how that if one is going to use the so-called subjective test, what did that person have in mind, then if that person, misguided though he may be, thought that he was doing something that was in the ultimate best interest of the United States he would not be guilty of a crime.

I think that the test the Senator is suggesting makes better sense. If that person would have reason to believe or a reasonable person would have cause to believe that to identify these agents would adversely affect the security interests of the United States he would be guilty of a crime, and to me it makes better sense.

Do not most of our criminal statutes work on the basis of what a person would reasonably expect under circumstances rather than what that particular person actually thought?

Mr. CHAFEE. I put in the RECORD a series of statutes.

The argument given by many of the former prosecutors around here is that you always have to prove intent. You have to have intent to prove murder or what it might be, and that this reason-to-believe standard is a new one that we have pulled up just to get easier prosecutions. This is not the situation at all.

We have put a series of acts on our books now in 18 U.S.C. dealing with this very standard that the Senator so eloquently spoke to.

It is not a new standard and, furthermore, it is not just this element alone that one has to prove: That he would have reason to believe that he would impair intelligence activities of the United States. There are six other standards of proof. There has to be, of course, a pattern of activities. You have to prove a pattern of activities in which the person intended to identify and expose covert agents. So there is that intent in our language.

Mr. LONG. I find myself wondering whether the language that the Senator would suggest is actually strong enough. I mean that would cause this Senator to wonder. Actually what we really want is to prevent those who have the knowledge of our agents to avoid needlessly identifying those agents to our enemies. That is what we have in mind.

Mr. CHAFEE. That is it.

Mr. LONG. I would hope that we would have an effective statute by the time we are through. I find myself agreeing with the Senator. If you are going to make it depend upon the intent of the person who is revealing the identity that person might be in good faith in his mind in seeking to identify them all, that he does not think there should be a CIA anyway, and if that were the case, I would think one would feel that he was not guilty of intending to injure the security of the United States.

Mr. CHAFEE. Just on this point I quote now on the very point the Senator is making. This is the testimony before the House Committee on Intelligence, on the last day of January last year, January 1981, and this is one of the publishers of the "Covert Action Information Bulletin" which specializes in naming names. Listen to the rationale of Mr. Schaap, the publisher.

> Our publication . . . is devoted to exposing what we view as the abuses of the Western intelligence agency, primarily though not exclusively the CIA, and to expose the people responsible for those abuses.
>
> We believe the best thing for the security and well-being of the United States would be to limit severely, if not abolish, the CIA.
>
> Our intent both in exposing the abuses of intelligence agencies and in exposing the people responsible for those abuses is to increase the moral force of this Nation, not to lessen it. That the CIA would assume our intent is simply to impair or impede their foreign intelligence also seems likely. Patriotism is to some extent in the eyes of the beholder.

In their eyes they are patriots. They are doing a tremendous service.

And that is exactly the point the Senator was making.

Mr. LONG. I thank the Senator.

Mr. CHAFEE. I thank the Senator.

Mr. KENNEDY. Mr. President, I support S. 391, the Agents Identities Protection Act. We should not adopt the substitute language offered by the Senator from Rhode Island (Mr. CHAFEE).

At the crux of this debate is the intent issue in section 601(c) of the act. That is the basic difference between the bill reported by the Judiciary Committee, and the language of the Chafee amendment.

The difference is a narrow but very important one. Both versions of the bill are expressly designed to permit prosecution of a group of persons, such as Philip Agee, who have made a clearly determined effort to disclose the identity of intelligence agents and officers for the sake of their exposure.

At the same time, advocates of both versions seek to reach that small group without encroaching upon the first amendment rights of those who seek informed public debate on foreign affairs.

Many scholars, as well as the journalistic community have raised serious questions about whether it is constitutional to make criminal any publication based wholely on unclassified sources. After careful study of that issue I have concluded that in carefully limited circumstances a criminal penalty is appropriate and constitutional. But the fact that we are treading near the line of the first amendment in that regard, should make us all the more careful in writing the standard for the defendant's state of mind required for prosecution.

Let us be clear on the narrow issue before us. No Senator approves of intentional efforts to endanger our convert intelligence officers or to end their usefulness. The question is how to punish such attempts without rendering our legislation unconstitutional and without unnecessarily chilling a vigorous free press.

But if we overreach in regard to this legislation it will work against the objective of the legislation which we all share.

Last year the Judiciary Committee agreed to my amendment to make this bill constitutional. In a subsequent effort to obtain agreement on the bill, I proposed an alternative modification to insure constitutionality. That proposal became the bill approved by the House Intelligence Committee and recently by the Senate Judiciary Committee. We can pass that bill today. We could have passed it last year. Those of us concerned about the outrageous public disclosure of intelligence agents identities simply for the sake of their exposure would like to see legislation passed as soon as possible, which will be upheld in the courts and put those reprehensible efforts out of business.

The Judiciary Committee bill requires proof of intent to harm. As the many hearing witnesses noted, such an intent requirement is quite common in our criminal statutes. Senator CHAFEE seeks to replace that intent requirement with a so-called objective "reason to believe" test. Under that test, a violation could be found regardless of the defendant's intent.

The CIA and the Justice Department have indicated on the record that while they have a preference, they can live with either version.

The CIA has cited the recent Supreme Court decision in Haig against Agee that upheld revocation of Agee's passport. In his July 15 letter to Senators, Director Casey wrote that:

> The Court's opinion should dispel any residual concerns about the constitutionality of the identities legislation.

In fact, Mr. President, the opinion does precisely the opposite. That case indicates that without the specific intent standard in the committee bill, the legislation would raise first amendment question. Chief Justice Burger, writing for the Court, noted that the passport revocation "rests in part on the content of Agee's speech specifically his repeated disclosures of intelligence operations and the names of intelligence personnel." Justice Burger dismissed the first amendment

problems because of Agee's expressed intent to harm intelligence activities.

Agee's disclosures, among other things, have *the declared purpose* of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. (Haig v. Agee (Slip opinion, p. 27) (1981) (emphasis added).)

Some officials have argued that prosecution would be easier under a "reason to believe" standard. In my view, a more thoughtful analysis suggests that it could be more difficult for the Government to prosecute under that standard.

Under a "reason to believe" test, defendants could create an insurmountable "greymail problem" by threatening to expose other sensitive information at the trial. For example, defensants could question the anonymity of the agent who was exposed. Defendants also could seek discovery of counterintelligence information about the effectiveness of cover arrangements and whether hostile intelligence services or terrorists had in fact already identified the agent. In many cases this could present an insuperable greymail problem for the Department of Justice, despite the greymail statutes passed in the last Congress, because the matters on which discovery might be sought would be relevant to the defense under an objective reason to believe standard. The greymail statute allows the court to bar discovery only on issues which are not directly relevant to the elements of the offense. Under the reason to believe test defendants might even be able to ask for the names of other agents whose identities had been exposed and the damage assessments of such exposures. That information would be relevant to determine whether there was reason to believe that the disclosure of the particular identity involved would significantly damage the intelligence efforts of our Government.

Under the subjective-intent standard, such greymail discovery would be of slight relevance and much easier to limit. These prosecutorial difficulties of a reason to believe standard underline the disturbing possibility that it would not deter or punish those at whom it is aimed, and that it would merely chill legitimate journalistic analysis of U.S. policy and activities abroad.

Last-minute floor statements in the context of conflicting elements of legislative history in both bodies may not be sufficient to protect even specific categories of activities which everyone wants to exempt. In addition, those few examples cannot possibly anticipate and exhaust the variety of circumstances in which legitimate activity could be deterred by this criminal statute with severe penalties.

A broad spectrum of constitutional scholars, civil libertarians, and leaders of the news media have expressed deep concern about the substitute language proposed by Senator CHAFEE.

The requirement of "intent to impede or impair" the intelligence activities of the United States is a reasonable and necessary limitation to protect the first amendment activities of journalist, scholars, and others whose purpose is reporting, analysis, and criticism of controversial or questionable actions by the Government.

The Chafee amendment language would reach beyond the Philip Agee's in our midst. It would put university presidents concerned about covert intelligence agents among their faculty, or journalists reporting on the activity of rogue intelligence employees on behalf of foreign terrorist regimes, in danger of intimidation by Government investigators, if not actual prosecution.

The reason to believe standard simply is not adequate protection for legitimate first amendment activities. Correspondents may have some reason to believe that the results of their investigative reporting could have some temporary impact on secret intelligence activities. In fact, the Justice Department witness told the Senate Judiciary Committee that in the Department's view the Chafee amendment would subject newsmen to criminal prosecution even for mere negligence. This would create a very chilling effect on a free press and be as dangerous to our society as the evil at which the bill is properly aimed.

Hope my colleagues will support the effective and constitutional provisions of the committee bill.

● Mr. ROTH. Mr. President, I intend to vote against the amendment offered by the distinguished Senator from Rhode Island (Mr. CHAFEE) to S. 391, the Intelligence Identities Protection Act. Although I was a cosponsor of Senator CHAFEE's original legislation, I believe the modifications made in the Judiciary Committee, at the instigation of my able colleague from Delaware, Senator BIDEN, preserve the basic purposes of the bill while eliminating any chilling effect that the threat of prosecution could have on legitimate news reporters and organizations.

As a member of the Intelligence Committee, I am determined, as I am sure every Member of the Senate is determined, to take strong steps to protect the identities of our Nation's intelligence agents. The deliberate disclosure of names of our agents, some of whom are stationed in areas where violent forces inimical to U.S. interests operate virtually unchecked, is a serious threat to our national security, not to mention to the lives and safety of the agents themselves and their families. The systematic disclosure of agents' names and assignments under the guise of investigative journalism is a reprehensible practice that must be halted by providing for the criminal prosecution of those individuals who deliberately endanger the lives of agents with the intent of sabotaging U.S. intelligence activities.

As urgent as this need is, however, we must take care that our response to it not impinge on the constitutional rights and freedoms of legitimate news organizations and reporters. I believe that Congress should always tread carefully when legislating in areas that touch on our basic constitutional rights, and that any potential intrusion on such fundamental tenents of our democracy as freedom of the press must be minimized. Our way of life and our system of government have survived and prospered for all these years largely because a free, unfettered and aggressive press has functioned to insure an informed citizenry. I would not want to see this Congress take action that might blunt the vital watchdog role of the press in seeking out and exposing wrongdoing by Government officials or agencies, unless such action was absolutely necessary to protect our national security or the lives and safety or our citizens.

Those who oppose the Chafee amendment, including representatives of virtually every major news organization in this country, argue that the "reason to believe" language of the Chafee amendment would place reporters and broadcasters at risk of criminal prosecution for reporting information that could lead to the identification of intelligence agents—even if such information had already been made public, and even if the intent of the reporter or broadcaster was to further the public interest. For example, they argue that the recent disclosure of questionable activities by former CIA agents by a number of newspapers, including my own hometown paper, the Wilmington News-Journal, could subject those responsible for the articles to criminal prosecution because they had "reason to believe" such disclosures would impair U.S. foreign intelligence activities.

After a careful review of these arguments, as well as those offered by supporters of the Chafee amendment, I have concluded that the reason-to-believe standard is unnecessarily broad, and that it could tend to deter legitimate news organizations from pursuing and reporting information the disclosure of which would be in the public interest. The intent standard in the bill reported by the Judiciary Committee appears to be sufficient to halt the systematic and deliberate publication of the names and assignments of U.S. intelligence agents. In fact, the staff of the Covert Action Information Bulletin, a publication specializing in publishing the names of intelligence agents with the clear intent of disrupting U.S. intelligence activities, announced in the October 1981 issue of the Bulletin that the "imminent passage" of S. 391 had forced them to discontinue their despicable practice of "naming names" of intelligence agents "until such time as the constitutionality of the act has been decided by the courts." Thus, with re-

spect to this particular publication at least, this legislation appears to have had its desired effect even before it becomes law.

Mr. President, the question of constitutionality raised by the editors of the Covert Action Information Bulletin is also of concern to me, but for an entirely different reason. I believe it is vitally important that this legislation clearly stand the test of constitutionality at the time it becomes law, so there will be no question of swift prosecution and punishment for those individuals who deliberately disclose the identities of intelligence agents. If the bill's constitutionality is suspect, some hardcore purveyors of agents' identities may be willing to continue their pernicious activities in the belief that the law will eventually be overturned by the courts. I believe this risk is a serious one. No less a constitutional authority than Prof. Philip Kurland, professor of law at the University of Chicago, has said of the reason-to-believe standard:

> I have little doubt that it is unconstitutional. I cannot see how a law that inhibits the publication, without malicious intent, of information that is in the public domain and previously published can be valid * * * I should be very much surprised if * * * the * * * courts were to legitimize what is, for me, the clearest violation of the First Amendment attempted by Congress in this era.

Rather than approving legislation of questionable constitutionality, and absent any convincing showing that those responsible for such publications as the Covert Action Information Bulletin would be able to avoid conviction under the "intent" standard of the Judiciary Committee bill, I believe the wisest course for the Senate to follow at this juncture is to pass the bill with the "intent" standard intact, thus minimizing any possible intrusion into first amendment rights, and then observe its effect on those who would damage our national security by systematically disclosing the names of our intelligence agents. If this practice continues, and if it subsequently becomes clear that juries are unwilling to convict those who violate the law, the Congress could then reconsider and strengthen the law to insure the certain prosecution and conviction of those whom the law is intended to reach. Thus, in opposing the Chafee amendment at this time, I would reserve the right to support a broader standard for prosecution at some time in the future if such a standard proves necessary to protect the identities of our agents and the vital activities of our intelligence community.

Mr. President, I ask that an editorial from the Wilmington Morning News entitled, "Spies Must Spy but Freedom Must Be Preserved," be printed in the RECORD.

The editorial follows:

[From the Wilmington (Del.) Morning News, Oct. 27, 1981]

SPIES MUST SPY BUT FREEDOM MUST BE PRESERVED

Uneasiness has always surrounded government efforts to secure information clandestinely. Spying may be a necessary component of national security. The principles of freedom and self-determination that permeate our society, however, demand that such government operations be constantly and vigilantly supervised.

We are used to assurances that the Central Intelligence Agency does not go beyond the bounds of acceptable morality—albeit such bounds are stretched to the breaking point in the circles of international intrigue. We are also aware that such assurances have been, far too frequently, little more than lies.

Tomorrow the Senate is expected to vote on a bill that could make it all but impossible for American citizens to be informed about abuses in covert activities being carried out, presumably, on their behalf.

The bill, S. 391, called "The Names of Agents Bill" is aimed at protecting U.S. secret agents. There is no quarrel with the intent. As distasteful as some secret activities might be, only fools believe that the United States can deal effectively in these times without some form of covert international intelligence operations.

Those who disclose the names of secret agents with the expressed intent of jeopardizing the agents' positions should be held accountable for such behavior. There have been recent, well-publicized examples of such reprehensible actions. Such disclosures put the agents' lives and the lives of their families and friends in danger. And such disclosures could severely damage the security of the United States.

Insofar as S. 391 and the similar House version, H.R. 4, address the protection of agents and the safeguarding of national security, they are supportable. But the House bill, in one provision, extends the government's right of self-protection into a constitutionally unacceptable area. The Senate bill, thanks largely to the efforts of Delaware's Sen. Joseph R. Biden Jr., does not. But when the bill is debated tomorrow, efforts will be made on the Senate floor to make the House version official policy.

The House version would subject to criminal penalties those who disclose identities "in the course of a pattern of activities intended to identify and expose covert agents and with *reason to believe* that such activities would impair or impede the foreign intelligence activities of the United States."

The Senate version, with the Biden amendment, would apply only to those who disclose identities "in the course of an effort to identify and expose covert agents with the *intent* to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure."

At stake are the constitutional guarantees of freedom of speech and freedom of the press: The Senate version would, rightly, punish people like Phillip Agee whose disclosure of agents' names put their lives and national security in danger. The House version would not only short-circuit Mr. Agee's kind of behavior but also gag responsible disclosure of intelligence abuses. It would punish even those who secured their information through documents open to the public scrutiny.

Under the House version, the News-Journal and other papers which disclosed the highly suspect activities of former American spy Edmund Wilson would be in jeopardy. Mr. Wilson's current CIA links and his dealings with international terrorists, possibly damaging to the United States, are precisely the kind of information the public has a right to know.

The Senate version would protect legitimate journalistic endeavor and, by extension, protect the right of Americans to gain knowledge of and thereby judge the activities of covert intelligence abuses.

There was considerable testimony in Congress that the House version is unconstitutional. Philip Kurland, the conservative constitutional scholar from the University of Chicago, described the "reason-to-believe" version as "the clearest violation of the First Amendment attempt by Congress in this era." If the House version passes, it likely will be overturned in court. But, in the interim the law would have a chilling effect on legitimate journalistic pursuit.

Those who seek the broad prohibitions on disclosure use an old tactic. "If you don't buy the whole package, they say "then you must be one of those who are trying to tear down the country." It doesn't wash.

Secret agents must be protected. But there have been abuses of power in covert intelligence operations. When covert agents act outside the circle of morality defined for them they damage national security. They cannot operate unbound.●

Mr. CHAFEE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HAYAKAWA. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

WELCOME PRESIDENT SIAD BARRE, DEMOCRATIC REPUBLIC OF SOMALIA

Mr. HAYAKAWA. Mr. President, on March 10 Maj. Gen. Siad Barre, President of the Democratic Republic of Somalia, began his official visit to the United States.

On this occasion, I would like to welcome President Barre to our country and express to him the good will and sympathy which the U.S. Senate has for Somalia. We wish to work with him for better and more cordial relations in the future. Both the United States and Somalia desire to limit Soviet and Cuban influence in Africa and insure the continued development and security of Somalia.

The United States has made substantial contributions to Somalia, both directly and through the United Nations High Commissioner for Refugees. The purpose of these contributions is to help alleviate the suffering of the innocent victims of the Ogaden war, develop Somalia's economy and supply needed arms to the Somalian army. We realize these efforts have not solved the underlying problems of refugee influx and inadequate arms, but in the next fiscal year we will extend increased economic aid and FMS, foreign military sales, to help to develop the country and provide for its defense needs. In turn, the Somali

Government extends to the United States use of air facilities at Mogadishiu and Berbera and naval facilities at the port of Berbera. We are fortunate to have friends like Somalia in the strategic Horn region, which is threatened by Soviet adventurism.

RESOLUTION TO REQUIRE ABSCAM/FBI INVESTIGATION BY THE COMMITTEE ON RULES AND ADMINISTRATION

Mr. THURMOND. Mr. President, the rules of the Senate and precedent establish that the Committee on the Judiciary has oversight responsibility for the operations of the Department of Justice and the Federal Bureau of Investigation. With respect to the FBI, that responsibility has been delegated by the committee to its Subcommittee on Security and Terrorism.

Accordingly, under ordinary circumstances, a proposed investigation of the activities of the FBI would be properly conducted only in the Committee on the Judiciary. However, in the case of the proposed investigation of FBI and Department of Justice activities in the Harrison Williams matter, in my judgment, the Committee on Rules and Administration is the proper forum because of the direct involvement of a former member of the Senate and because of the issues which will necessarily arise due to that connection.

So long as the proposed investigation remains narrowly focused in the manner prescribed in the Senate resolution now under consideration in the Committee on Rules and Administration, as chairman of the Committee on the Judiciary, I would have no objection to the Committee on Rules and Administration acting on behalf of the Senate as that resolution specifies.

THE NATIONAL CEMETERY IN FLORENCE, S.C.

Mr. THURMOND. Mr. President, I recently received a concurrent resolution of the South Carolina Legislature memorializing Congress to promptly take such measures as are necessary to purchase land presently available for acquisition for the purpose of expanding the Florence, S.C., National Cemetery.

Mr. President, the Veterans' Administration has projected that the Florence National Cemetery will reach its capacity by the middle of this year. If it is not expanded, only one national cemetery, in Beaufort, S.C., will remain available to the 336,000 veterans of our State. No longer will the families and survivors of these veterans be assured that their loved ones will be interred locally, rather than at some distant cemetery.

I, therefore, urge the Veterans' Administration to explore all available methods for expanding the Florence National Cemetery. I would also like to restate my willingness to assist in this effort in any way that I can.

Mr. President, in behalf of my distinguished colleague, Mr. HOLLINGS, and myself, I ask unanimous consent that the concurrent resolution of the legislature of South Carolina be included in the RECORD at the conclusion of these remarks.

There being no objection, the concurrent resolution was ordered to be printed in the RECORD, as follows:

CONCURRENT RESOLUTION

Whereas, the National Cemetery in Florence County, South Carolina, provides grave-sites for veterans and serves the commendable purpose of permitting the interment of veterans in a special local place of honor; and

Whereas, ninety-five veterans were buried in the National Cemetery last year, leaving only fifty-one gravesites available for subsequent interments; and

Whereas, it is necessary and desirable that additional gravesites in adequate numbers be made available for deceased veterans of South Carolina so that the families and survivors of such veterans are assured that their loved ones will be interred locally rather than at some distant cemetery: Now, therefore, be it

Resolved by the House of Representatives, the Senate concurring: That the Congress of the United States is memorialized to promptly take such measures as may be necessary to purchase land presently available for acquisition and contiguous to the National Cemetery in Florence County, South Carolina, to provide for the expansion of the cemetery by providing additional gravesites for veterans. Be it further

Resolved That copies of this resolution be forwarded to the President of the Senate, the Speaker of the House of Representatives and each member of the South Carolina Congressional Delegation in Washington, D.C.

REGULATORY REFORM ARTICLE BY SENATOR LAXALT

Mr. THURMOND. Mr. President, I would like to call the attention of my colleagues to an article which appeared this morning in the Washington Post. The article, entitled "Don't Be Scared Off By Regulatory Reform," was written by Senator LAXALT, who chairs the Regulatory Reform Subcommittee of the Judiciary Committee. As I am sure most of my colleagues are aware, Senator LAXALT is the primary sponsor of S. 1080, the Regulatory Reform Act, which will shortly be coming before the full Senate.

In his article, Senator LAXALT describes in general the provisions of S. 1080, discusses in greater detail the oversight provisions of the bill, and responds to the criticisms and concerns expressed by Senator GLENN in his February 25 Washington Post article regarding executive oversight of independent agencies. In light of the importance of issues raised by this legislation and of the fact of imminent floor consideration, I commend Senator LAXALT's very helpful and informative discussion of S. 1080 to my colleagues. I therefore ask unanimous consent that the article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Mar. 15, 1982]

DON'T BE SCARED OFF REGULATORY REFORM

(By PAUL LAXALT)

Judging by opinion polls, the American people are presenting Congress with a unique challenge in "regulatory reform": we must curb regulatory excesses while maintaining our commitment to important national goals—worker safety, clean air and water and the like. The Regulatory Reform Act, sponsored by Sens. Patrick Leahy, William Roth, Thomas Eagleton, myself and 77 other senators, and soon to be considered by the Senate, responsibly meets this challenge. Enactment of this kind of legislation is long overdue.

Unfortunately, some would unnecessarily shield an important part of the activities of so-called "independent" agencies from effective public accountability. The views of these advocates are wrong based on longstanding rules of law; they are wrong based on the provisions of the Regulatory Reform Act; and they are wrong based on the balanced policies our constituents expect us to put in place.

This bill is designed to update our administrative procedures to meet the regulatory challenges of today, to improve the effectiveness of federal regulation, to decrease its unnecessary burdens and to increase the accountability of federal agencies. How to ensure that federal agencies comply with the law and execute their missions fairly remains one of the central challenges of administrative law. To achieve agency accountability, the Regulatory Reform Act contains a carefully crafted balance of limited judicial and presidential oversight, a balance that preserves the rule-making authority given to all agencies. Amendments to weaken or upset this balance are simply unacceptable.

The heart of this act is the requirement for the regulatory analysis of major rules, a process by which agencies must publicly evaluate the tradeoffs of their regulatory proposals to improve their effectiveness and reduce their costs. Yet because detailed judicial review of such a technically complex process is generally considered to lead to unnecessary delay and judicial second-guessing of substantive agency expertise, the act precludes regulatory analysis from being an independent subject of judicial review.

To ensure some oversight of such a central element of regulatory reform, the act authorizes the president to establish procedures for regulatory analysis. Contrary to suggestions that such a proposal is unprecedented, the regulatory reform bills reported both by the Senate Governmental Affairs Committee and by the House Judiciary Committee during the 96th Congress contained broad provisions for OMB review of regulations without any distinction between "executive" and "independent" agencies. The real novelty of the Regulatory Reform Act is that its executive oversight is much more carefully circumscribed than the proposals of the last Congress.

The president may establish procedures for regulatory analysis only after publishing them and receiving public comment. If the president delegates this authority to an official other than the vice president, that official must be confirmed by the Senate. Most importantly, the act explicitly ensures that the decision-making authority of all agencies is not altered.